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IN THE

Supreme Court of the United States

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST, and CAROLA EVA PRENDERGAST,
Respondents.

BRIEF FOR RESPONDENTS.

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Respondents.

BRIEF FOR RESPONDENTS.

Prefatory Note.

The instant case does not involve the efforts of the owner of a private home to choose the person to whom he will sell or lease. [*Cf., Br.*, 13-14, 23.[1]] What is involved here is racial discrimination by owners of multiple-dwelling buildings who are engaged in the business of renting, to the public, apartment units in those buildings. [See, pp. 7, 9, *infra.*] Only two of the seven cases that were heard together below are here.[2]

[1]The "Brief for Petitioners" herein is referred to by us merely as "*Br.*"

The California constitutional amendment here involved [*Br.* 3] is referred to in this brief as "section 26."

[2]Of the five cases that are not here only one [*Hill v. Miller*, 64 Cal. 2d 757, 413 P. 2d 852, 51 Cal. Rptr. 689] involved a private-home owner [see *Br.*, 8-9]; and in its judgment below went in favor of the owner.

Petitioners assert that section 26 "forbids governmental restrictions upon the privilege of residential owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance or whatever . . ." [*Br.*, 17-18.] That description of the section is singularly incomplete, and irrelevant at bar. The fact is that no one in this case claims to have been denied an equal opportunity to get a home, because he or she was of the wrong sex or age, unseemly in appearance, kept pets, or had followed the Biblical injunction [Gen. 35:11] to be fruitful and multiply. What *is* claimed is that petitioners, being in the business of renting residential accommodations, denied respondents an equal opportunity to get a home, simply and solely because they are Negroes. This case involves racial discrimination, and the unconstitutionality of it when the State involves itself in it by making it a constitutional right, and by otherwise encouraging and assisting in its consummation.

The fact, as petitioners several times mention [*Br.*, 6, 20, 23, 34], that section 26 was added to the state constitution by the direct vote of the people, is quite beside the point. The people acting directly may no more violate the constitution of the United States than may their legislative, judicial or executive representatives. [*Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-737. Also, see: *McCulloch v. Maryland*, 4 Wheat. 316, 405-406.]

Jurisdiction.

This Court is without jurisdiction of *Reitman v. Mulkey,* one of the two cases brought here pursuant to a single petition for certiorari. The judgment in that case is one of reversal; it leaves the case remanded for trial on the merits just as though there had never been a judgment. [*Central Sav. Bank v. Lake,* 201 Cal. 438, 443, 257 Pac. 521, 523.] It is not, therefore, a final judgment. [*Southern Pacific Co. v. Gileo,* 351 U.S. 493, 495-496; *Pope v. Atlantic Coast Line R. Co.,* 345 U.S. 379, 381-382; *Gospel Army v. Los Angeles,* 331 U.S. 543, 546-547.] The want of finality is fatal to this Court's jurisdiction. [28 U.S. Code, §1257(3); *Market Street R. Co. v. Railroad Com.,* 324 U.S. 548, 551.]

Constitutional Provisions Involved.

The single State constitutional provision, to the unconstitutionality of which under the Federal constitution, the decision below is directed, is section 26 of article I of the Constitution of California. It may be found in the official edition at California Statutes, 1965, vol. 1, p. A-15. It is given here completely, as petitioners omit a part of it.

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

" 'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

" 'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable."

Restatement of Questions Involved.

1. Does a state constitutional provision, that makes it a secured and absolute right for an owner of residential property to refuse to sell, lease or rent the property because of the proposed acquirer's race, color or religion, so authorize, approve or encourage racial discrimination as to involve the State in the owners' racially discriminatory refusal, and thereby render the provision obnoxious to the Equal Protection Clause of the Constitution of the United States?

2. Is such state constitutional provision invalid under the Supremacy Clause, because it is inconsistent with the federal Civil Rights Acts guaranteeing to all persons the same right to make contracts and to purchase, hold and lease real property as is enjoyed by white citizens?

3. Does the State violate the Due Process Clause of the Fourteenth Amendment when it effectively disenables itself and all its agencies, subdivisions and agents from rendering, and denies, any relief or remedy for irreparable suffered by those who, solely because they are Negroes, are refused an equal opportunity to acquire, rent or lease residential property?

4. Does the State deny equal protection of the laws when, through the coercive processes of its courts, it enforces an eviction of a negro tenant from residential accommodations rented to him at will, the sole ground of the eviction being the tenant's race?

Statement of the Case.

Petitioners "Statement of the Cases" [*Br.*, pp. 5-9] is not complete. More of the proceedings below is needed to show how and why the question here involved arose. More, too, is needed of the facts concerning racial discrimination and *de facto* residential segregation in California, as well as of the facts relating to the circumstances in which the state constitutional provision here involved was adopted and in which it will operate.[3] That more follows.

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[3]The State Supreme Court, in order to ascertain the "immediate objective" of section 26, and to place it in "its historical context and the conditions existing prior to its enacment," noticed and considered the relevant facts. [R. 17-19.] In California, at the time the instant causes were pending in the State court, historical and legislative facts of this sort, and facts of common knowledge, were (they still are, but under different statutory provisions, see *Cal. Evidence Code*, secs. 451, 452), properly the subjects of judicial notice. [*Cal. Code of Civil Procedure* (1965), sec. 1875, subds. 3, 8; *Ventura County Harbor District v. Board of Supervisors*, 211 Cal. 271, 277, 295 Pac. 6, 8; *People v. Torres*, 56 Cal. 2d 864, 866, 366 P. 2d 823, 825, 17 Cal. Rptr. 496, 497; *Wilson v. Loew's Inc.*, 142 Cal. App. 2d 183, 188, 298 P. 2d 152, 156, and cases there cited in note 3.] This Court has the same power of judicial notice as the court whose judgment is under review. [*Hanley v. Donoghue*, 116 U.S. 1, 6; *Chicago and Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622-623; *Adams v. Saenger*, 303 U.S. 59, 63; *Renaud v. Abbott*, 116 U.S. 277, 285.] The California Supreme Court's power of judicial notice was not dependent, and, therefore, neither is this Court's, upon exercise of the power in the lower court. It may be exercised by the reviewing court even though the lower court failed or refused to do so. [*Rogers v. Cady*, 104 Cal. 288, 290, 38 Pac. 81; *People v. Stralla*, 14 Cal. 2d 617, 620, 96 P. 2d 941, 942; *People v. Tossetti*, 107 Cal. App. 7, 12, 289 Pac. 881, 883.]

The power should be exercised in the instant case, for the noticed facts serve to define the discriminatory purpose that section 26 was avowedly designed to serve; and, also, to show clearly the intended and natural operation and effect of the section in the conditions in which it does and will operate in California. [See, pp. 11-18, *infra*.]

1. *Mulkey v. Reitman.*[4] Lincoln W. Mulkey and Dorothy J. Mulkey are Negroes, husband and wife, and citizens of the United States. [R. 2] They are two of the respondents here. The petitioner Neil Reitman is the owner of an apartment building in Santa Ana, California (in the County of Orange, of which county Mr. and Mrs. Mulkey are residents); the other petitioners are the managers of that building; and all petitioners are in the business of renting apartments to members of the public. [R. 2-3.] In May, 1963, one or more apartments in that building were unoccupied and were being offered by petitioners to the public for rent. [R. 3.] Mr. and Mrs. Mulkey, at that time, offered to rent one of the apartments, but the petitioners refused to rent any apartment to them, solely because they were Negroes. [R. 3.] As a consequence of that refusal, Mr. and Mrs. Mulkey were unable to rent a suitable place to live, suffered "humility [sic]" (but meaning "humiliation"), disappointment and pain and suffering, to their general damage in the sum of $50,000.00. [R. 3.]

Petitioners will continue to refuse to rent to Mr. and Mrs. Mulkey or to other Negroes, solely because of their race, unless enjoined by the court. The discrimination practiced by petitioners is also practiced by other real estate brokers and home and apartment landlords and owners in Orange County, and throughout California. [R. 4.] Mr. and Mrs. Mulkey, therefore, brought the action, as a clsss action in behalf of all persons discriminated against because of their race or color. [R.

[4]The case was decided in the trial court on the pleadings. [R. 10-13.] The facts summarized are those alleged in the Mulkeys' complaint, and which, for purposes of the proceedings below, had to be and were taken as true. [*Davis v. Santa Ana*, 108 Cal. App. 2d 669, 685, 239 P. 2d 656, 665.]

2, 4.] They prayed for monetary damages and an injunction against the discrimination alleged. [R. 4-5.]

This action was commenced on May 29, 1963 [R. 2], which was before section 26 was adopted. The Unruh Civil Rights Act [*Cal. Civil Code,* secs. 51, 52 (Cal. Stats., 1959, c. 1866, p. 4424; Cal. Stats. 1961, c. 1187, p. 2920)] was in full force and effect at that time. The Mulkey action was designed, *i.a.,* to recover the general and statutory damages provided for in that Act.[5] [R. 3, 4-5.] Upon adoption of section 26, petitioners moved in the trial court for, what was in a legal effect, a judgment on the pleadings, on the sole ground that section 26 "rendered Civil Code Sections 51 and 52 upon which this action is based null and void." [R. 10.] The motion was granted on that ground and a judgment that the Mulkeys take nothing was entered. [R.

[5]So far as material here, the Unruh Civil Rights Act provided (and still provides):

§51. "All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

§52. "Whoever denies . . . or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 . . . is liable . . . for the actual damages and two hundred fifty dollars ($250.00) in addition thereto, suffered by any person denied the rights provided in section 51 . . ."

The Act has been construed by the State courts to apply to persons in the business of selling real estate, whether as owner or broker [*Lee v. O'Hara,* 57 Cal. 2d 476, 478, 370 P. 2d 321, 322, 20 Cal. Rptr. 617, 618; *Burks v. Poppy Const. Co.,* 57 Cal. 2d 463, 468-469, 370 P. 2d 313, 315-316, 20 Cal. Rptr. 609, 611-612; *Don Wilson Builders v. Superior Court,* 220 Cal. App. 2d 77, 82, 33 Cal. Rptr. 621, 624; *Crowell v. Isaacs,* 235 Cal. App. 2d 755, 757, 45 Cal. Rptr. 566, 567]; and to persons renting units or apartments in a multiple-unit dwelling. [*Swann v. Burkett,* 209 Cal. App. 2d 685, 26 Cal. Rptr. 286.]

12-13.] On appeal by Mr. and Mrs. Mulkey to the State Supreme Court [R. 13-14] the judgment was reversed [R. 14, 31], on the ground that section 26 was an unconstitutional infringement of the Fourteenth Amendment. [R. 17, 31, 81, 83-84.]

2. *Prendergast v. Snyder.*[6] Respondent Wilfred J. Prendergast, a Negro, and Carola Eva Prendergast, a Caucasian, are husband and wife. [R. 51.] Petitioner Clarence Snyder is the owner of a seven-unit apartment building in Los Angeles, which he rents to tenants. [R. 51.] On July 13, 1964, he rented it, through a realtor, to Mrs. Prendergast. The realtor was then advised that Mrs. Prendergast's husband was working in San Francisco, but would join her to live in the rented apartment as soon as he was transferred to Los Angeles. [R. 51-52.] Neither petitioner Snyder nor the realtor knew at that time that the husband, respondent Wilfred J. Prendergast, was a Negro. In October, 1964, Mr. Prendergast stayed with his wife at the apartment, at which time the realtor saw he was a Negro. The following month he moved into the apartment and there lived with his wife. [R. 52.] Within the month, petitioner served a notice to quit upon the Prendergasts. The sole reason for that notice was that respondent Wilfred J. Prendergast is a Negro. [R. 53.] It was not sooner served because of the requirements of the Unruh Civil Rights Act. [See fn. 5, p. 8, *supra*]. It was, however, served promptly after section 26 was adopted. [R. 53-54.] Unless restrained, petitioner Snyder will cause the Prendergasts to be evicted, for which they have no adequate remedy at law; and he will also refuse to rent to other Negroes. [R. 54.]

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[6]Like *Mulkey*, this case also was decided on the pleadings. [R. 79-80.] The facts as stated are those alleged.

The Prendergasts sued to restrain the threatened eviction. [R. 51, 54-55.] Petitioner Snyder cross-complained against the Prendergasts to have it adjudicated and declared that the Prendergast tenancy had been lawfully terminated and that he has the right to have a court recognize and enforce that termination, even if his sole reason for it and for his seeking judicial recognition of it is the race of Mr. Prendergast. [R. 63, 65-66.] He alleged in the cross-complaint that it was his intention to live in his apartment building, but he did not desire so to do so long as the Prendergasts are in it; and that he does not desire to rent any of the apartments to Negroes. [R. 64, 65.]

Petitioner Snyder moved in the trial court for a summary judgment dismissing the Prendergasts' complaint and granting him the relief prayed for in the cross-complaint. [R. 58-59.] The motion was supported by averment of facts designed to show the economic loss he would suffer if he could not keep Negro tenants out of his building. [R. 59-62, 67-69.] The real, though implicit, ground of the motion, however, was, in substance that, by reason of section 26 he had the absolute right to refuse, on racial grounds, to rent or lease. [R. 59, 65-66, 73.] The trial court ruled that for the court to grant any relief on the cross-complaint would be to violate the Fourteenth Amendment. Accordingly, it entered judgment dismissing the cross-complaint. [R. 80.]

Petitioner Snyder appealed from the judgment. The State Supreme Court affirmed, primarily on the same grounds for which it reversed *Mulkey* [R. 81, 83-84]; and alternatively, on the ground that judicial enforcement of the racially motivated eviction would be unconstitutional. [R. 84.]

3. *Racial Discrimination In California.* Racial discrimination in California is not a new story.[7] It has existed a long time and its roots are deeply embedded in the State's history and the habits and customs of its people.[8] The result has been extensive *de facto* resi-

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[7]Petitioners seem to equate racial discrimination with private prejudice or bigotry. [*Br.*, 42.] No doubt such prejudice or bigotry is a frequent motivation of the discrimination, but it is not the only one. Other motivations stem from economics, social snobbery, and direct and indirect influences of various governmental policies of action or inaction that coerce or encourage the discrimination. The important thing is not the motivation, but the result or fact of racial discrimination. When the latter exists its impact upon those discriminated against and upon society as a whole—personal humilitation, deprivation of personal dignity, *de facto* relegation to second-class citizenship, denial of equal participation in communal life, creation of slums and their sequelae of disease, crime and anti-social attitudes [see, *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-253, 291-292; *Senate Report No. 872*, 88th Cong. 2d Sess., p. 16; *Burks v. Poppy Construction Co., supra*, 57 Cal. 2d at 471, 370 P. 2d at 317, 20 Cal. Rptr. at 613; *Jackson v. Pasadena School Dist.*, 59 Cal. 2d 876, 880, 881; 382 P. 2d 878, 880-881, 882; 31 Cal. Rptr. 606, 608-609, 610]—are the same, regardless of the motive that produced the discrimination. [See, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725.]

[8]Until 1952, the state constitution required the legislature to authorize cities and towns to remove Chinese from their limits or compel them to live in prescribed areas within those limits; and it prohibited the employment of Chinese by corporations or on public works. [*Cal. Const.* (1879) art. XIX, secs. 2, 3, 4.] Chinese, as well as Negroes and Indians, were judicially held to be incompetent to testify as witnesses in any case to which a white was a party. [*People v. Hall*, 4 Cal. 399.] Other forms of official discrimination against Chinese led to one of the earliest of this Court's decisions to apply the Equal Protection Clause to racial discrimination. [*Yick Wo v. Hopkins*, 118 U.S. 356.]

Segregated schools for Negroes, Indians, Chinese, Japanese and Mongolians were authorized by statutes [*Cal. Laws, 1869-70*, p. 838, secs. 53, 56; *Kerr's Cal. Political Code* (1920), secs. 1662, 1669, 1670; *Cal. Education Code* (1943), secs. 8003, 8004; and see *Wysinger v. Crookshank*, 82 Cal. 588, 23 Pac. 54; and *Ward v. Flood*, 48 Cal. 37, 17 Am. Rep. 405], the last of which was not repealed until 1947. [Cal. Stats. 1947, c. 737, p. 1798.] Mexican-Americans have been segregated into separate

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dential segregation of racial minorities, especially Negroes. This result, it is no doubt true, has not been caused solely by racial prejudice, but it has been caused by racial *discrimination*. That discrimination is itself the product of the interplay of private and governmental action. In sum, discrimination (whether motivated or caused by prejudice is immaterial), has been the prevalent pattern of conduct by owners, brokers, lender and builders in California. [U.S. Commission on Civil Rights, *50 States Report*, pp. 43-46; U.S. Commission on Civil Rights Report (1961), *Book 4, Housing*, pp. 2-4, 132-138, 144-145.] An important part has been played by active aid from government, such as, for example, enforcement of restrictive racial covenants, and compulsion or coercion, as well as toleration, of or permission to engage in discriminatory practices. [See, fn. 8, p. 11, *supra*. Also, pp. 33-34, *infra*.] From that interplay of private and governmental conduct there has resulted a widespread and long-standing

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schools [see, *Westminster School District v. Mendez*, 9 Cir., 161 F. 2d 774], and denied admission to public recreational facilities. [See, *Lopez v. Seccombe*, S.D. Cal., 71 F. Supp. 769.] Negroes have been discriminated against in admission to low-rent public housing [see, *Banks v. Housing Authority*, 120 Cal. App. 2d 1, 260 P. 2d 668, *cert. den.*, 347 U.S. 974]; and Japanese have been prohibited from owning land. [See, *Sei Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617.]

Race covenants in deeds that restricted occupancy of the property to Caucasians were held valid and enforceable [see, *e.g., Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 682-683, 186 Pac. 596, 597-598], until 1948, when, under the compulsion of *Shelley v. Kraemer*, 334 U.S. 1, they were held judicially unenforceable. [*Cumings v. Hokr*, 31 Cal. 2d 844, 193 P. 2d 742.] An idea of the considerable extent to which these restrictions were used may be gleaned from the fact that in *Cumings*, 31 Cal. 2d at 845-846, 193 P. 2d at 742, seven such California decisions are cited; and there are at least three more. [*Janss Investment Co. v. Walden*, 196 Cal. 753, 239 Pac. 34; *Forest Lawn Memorial Pk. Assn. v. De Jarnette*, 79 Cal. App. 601, 604, 250 Pac. 581; *Burkhardt v. Lofton*, 63 Cal. App. 2d 230, 233, 238, 146 P. 2d 720, 721, 724.]

community custom of discrimination, which, in its turn, has produced in California extensive *de facto* segregation or zoning along racial lines.[9]

In any community in which there is a substantial non-white population, residential areas are divided into white and non-white zones or districts that are as sharply defined as though laid out to conform to an ordinance fixing their boundaries. Few, if any, of the non-whites live or are able to live in the white zones, even though they may desire and can afford to live there. They are forced to live in the district that by discriminatory community custom has become the district allotted to them. The facts in this regard are notorious; they are matters of common knowledge, as they are apparent and observable to anyone who passes through the districts in question.[10] They have been documented in detail in a good many studies, official reports and judicial decisions.[11] Typically descriptive of

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[9]The governmental forces at work that contribute to this community custom in California are described by Judge Loren Miller in "Government's Responsibility for Residential Segregation" published in *Race and Property* (fn. 11, p. 13, *infra*), pp. 58, 60-64.

[10]Such facts are judicially noticeable in California [Cases cited, fn. 3, p. 6, *supra.*]

[11]The Court, of course, may resort to any source that satisfies its mind, to inform itself of the facts that it notices judicially. [Wigmore, *Evidence* (3d ed.), Vol. 9, sec. 2658a, pp. 537-538; *People v. Mayes,* 113 Cal. 618, 626, 45 Pac. 860, 862.] Among the many sources from which the Court may inform its judicial knowledge of residential segregation in California (to all of which the court below was referred by one or another of the parties), are the following:

U.S. Commission on Civil Rights Report (1961), *Book* No. 4, *Housing* (1961), pp. 1-4, 132-138, 144-145.

U.S. Commission on Civil Rights, *50 States Report,* California Advisory Committee (1961), pp. 43-46.

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the conditions in California, in which, of course, section 26 must operate, is the following from the California Advisory Committee to the U. S. Commission on Civil Rights, reporting in 1961 [U. S. Commission on Civil Rights, *50 States Report,* pp. 43-46]:

> "The State of California has a large and increasing Negro population. These people live mainly in segregated patterns in major urban centers of the State. In most cases, Negro housing areas are considerably less attractive than housing in other areas. . . .
>
> "As California's Negro population increases, pressure builds up in the great urban ghettos, and slowly but perceptibly the segregated areas enlarge. The Committee found that, as a general rule, Negro families do not move individually throughout the community. They move as a group. This is true in most cases of the relatively high-wage Negro professional group. It is practically universally true of Negroes in the lower income mass-group.
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> * * * *
>
> "This Negro housing problem is widespread. Negroes encounter discrimination not only where houses in subdivisions and in white neighborhoods

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Los Angeles County Commission On Human Relations, *Population Housing In Los Angeles County* (1963), pp. 2-4.

U. of Calif. Extension Series On Public Issues, *Race and Property* (Diablo Press 1964. Denton ed.), pp. 6-8, 58-76.

McEntire, *Residence and Race* (U. of Calif. Press, 1960), pp. 32-67.

Kaplan, *Discrimination in California Housing,* 50 Cal. Law Rev. 635, 644.

Jackson v. Pasadena School District, 59 Cal. 2d 876, 878-879, 382 P. 2d 878, 880, 31 Cal. Rptr. 606, 608.

are concerned but also in regard to trailer parks and motels. Testimony received by the Committee indicated that the trailer-park situation is particularly acute and that, especially in the southern part of the State, few, if any, trailer parks will accept Negroes."

In McEntire, *Residence and Race* (*op. cit.*, fn. 11, p. 13, *supra*), pp. 32-67, there is a chapter describing residential patterns in twelve large cities representing the major regions of the country, including, at pages 61-66, maps showing the racial concentrations in San Francisco and Los Angeles. The upshot of these extensive surveys of residential conditions is to prove beyond dispute the existence in California, as in many other places, of *de facto* racial zoning.[12]

4. *Enactment of Section 26, and Its Purpose.* Prior to 1959 there was no prohibition, direct or indirect, in California, of racial discrimination in the sale, rental or leasing of residential property. There was, however, a civil rights statute of fairly limited scope. [Cal. Stats. 1905, c. 413, p. 553; *Cal. Civil Code* (1923), secs. 51, 52.] It did not cover all persons, but was limited to citizens, who, it was declared, were entitled to the full and equal accommodations, facilities and privileges of inns, restaurants, theaters and similar places of public accommodation. In 1959, this statute was extended to proscribe discrimination in all business establishments;

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[12]Even if racial zoning or segregation is not due primarily to racial prejudice, it exists and in practical operation amounts to discrimination. Section 26 has the effect, indeed the intended effect, of enabling the segregation to continue and to spread; and, as well, to burke governmental efforts to eliminate it or prevent its future extension, by direct, proscriptive action against private contributions to the condition. [See, pp. 15-18, *infra.*]

and its benefits were made applicable to all persons within the State's jurisdiction. [Cal. Stats. 1959, c. 1866, p. 4424. See fn. 5, p. 8, *supra.*] And, also in 1959, by the Hawkins Act, racial discrimination in the sale, rental or leasing of "publicly assisted" housing was prohibited.[13] [Cal. Stats. 1959, c. 1681, p. 4074.]

Nonetheless, there was throughout the State a high degree of *de facto* residential segregation and districting along racial lines. [See, pp. 11-15, *supra.*] Public attention on that condition was focused in 1963 by a number of mass, and sometimes turbulent, protest demonstrations in and about residential subdivisions whose owners and developers were or were charged to be discriminating against Negroes. Ultimately, in that year, the Rumford Fair Housing Act was enacted. [Cal. Stats. 1963, c. 1853, p. 383; *Cal. Health and Safety Code,* Div. 24, Part 5 (beginning with section 35700).] This Act prohibited discrimination in housing accommodations because of "race, color, religion, national origin or ancestry" and declared such discrimination to be against the public policy of the State. [Cal. Stats. 1963, c. 1853, pp. 3823, 3824, sec. 2; *Cal. Health & Safety Code,* secs. 35700, 35720.] It also set up a comprehensive system of enforcing that prohibition. The system included provisions for investigation and mediation of complaints of discrimination, as well as for prevention or compelled cessation of it.[14] [Cal. Stats. 1963, c. 1853, p. 3825; *Cal. Health & Safety Code,* Div. 24, Part 5, Ch. 4, beginning with sec. 35730.]

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[13]The Hawkins Act was superseded and repealed in 1963 by the Rumford Fair Housing Act. [See, p. 16, *infra.*]

[14]Only the prohibitory provisions of this comprehensive statute are printed by petitioners at pages 10-11 of the Appendix to their Brief. The procedural provisions, through which the purpose of the statute is to be achieved, are omitted.

Adoption of the Act was vigorously opposed by such real estate and property owners' organizations as the California Real Estate Association, California Committee for Home Protection, and the California Apartment Owners Association [see, *Br.*, Appendix, pp. 3, 5,]. Notwithstanding that a campaign to subject the Act to a referendum was begun, those opponents of the Act refused to support the referendum. They wanted more than mere repeal, more than an absence of legislation prohibitory of racial discrimination in the disposition of residential property. What they wanted was an amendment to the state constitution that would affirmatively and absolutely secure the right so to discriminate. So, they quickly commenced qualification of an initiative measure to undo what the legislature had done and to restore and secure freedom to discriminate beyond the power of the State to interfere. The ultimate result was the addition of section 26 to the State constitution. [U. of Calif. Extension Series On Public Issues, *Race and Property* (Diablo Press. 1964, Denton ed.), pp. 6-8.]

As is required by California law [*Cal. Elections Code*, Div. 4, chap. 1, article 3 (beginning with section 3555)], submission of the measure to the electorate was accompanied by official arguments pro and con, a copy of which went to every registered voter in the State.[15] [See, *Br.*, Appendix, pp. 2-7.] The argument

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[15]These "ballot arguments" are, in California, an accepted aid to ascertainment of legislative intention and purpose. [*People v. Ottey*, 5 Cal. 2d 714, 723-724, 56 P. 2d 193, 197-198; *Beneficial Loan Soc. v. Haight*, 215 Cal. 506, 515, 11 P. 2d 857, 860, quoting and approving the opinion in *Crooks v. People's Fin. etc. Co.*, 111 Cal. App. (Supp.) 769, 775-776, 292 Pac. 1065, 1067; *Crees v. Cal. State Board*, 213 Cal. App. 2d 195, 211, 28 Cal. Rptr. 621, 630-631; *In re Goddard*, 24 Cal. App. 2d 132, 140-141, 74 P. 2d 818, 823-824.]

in favor of the measure laid bare its purpose to permit and enable the carrying on of the practice of racial discrimination in the sale, rental and leasing of residential property. It did so in these words:

> ". . . this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.
>
> "Most owners of such property lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry.
>
> * * * *
>
> "Your 'Yes' vote will require the State to remain neutral: Neither to forbid nor to force a home or apartment owner to sell or rent to one particular person over another." [*Br.*, Appendix, p. 3]

Section 26 as proposed and adopted did not expressly repeal the Rumford Act or any other statutory or constitutional provision. Whatever repealing effect it may have had was but the consequence to be implied from its positive prohibition, as a part of the State constitution, of any denial, limitation or abridgement of the right of any person "to decline to sell, lease or rent [his] property to such person or persons as he, in his absolute discretion chooses."

Summary of the Argument.

(1) By an amendment to its constitution (section 26), the State of California has provided that neither it nor any subdivision or agency thereof shall deny, limit or abridge the right of an owner of residential property to refuse to sell, lease or rent it to such person as he in his absolute discretion chooses. The avowed purpose of the amendment was to make it possible once again, as it recently had not been lawfully possible because of prohibitory statutes, but as before, had been the long-standing community custom, to refuse to sell, lease or rent residential property to Negroes and other racial or religious minorities. Two actions in the state courts were brought by Negroes against the petitioners here, who are in the business of renting apartments to the public in buildings they own. One of these actions was for injunctive relief and monetary damages on account of a racially motivated refusal to rent an available apartment; the other was to enjoin an eviction of a husband and wife from an apartment, because the husband was a Negro. In these actions, section 26 was invoked by the petitioners in justification of the racial discrimination against which the actions were brought.

Section 26, by reason of its inherent and admitted purpose to authorize or permit racial discrimination and its natural operation and effect to accomplish that purpose, is obnoxious to the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and to the Supremacy Clause, of the Constitution of the United States, because it involves the State in the racial discrimination practiced on respondents and which is being and will be practiced on many others similarly situated. This involvement of the State is the equivalent

of "state action" and is established by these considerations:

First: The State has made the right to discriminate on racial grounds in the sale, rental or leasing of residential property, a secured and absolute constitutional right. It, therefore, has done much more than, through inaction or indifference, merely to permit such discrimination. It has made a deliberate and purposeful choice to make a constitutional right out of racial discrimination. That is, in necessary and realistic effect, authorization by the State of the ensuing discrimination.

Second: The State, acting formally and officially by enactment of an amendment to its constitution, has encouraged its people to discriminate against racial minorities. The amendment was enacted for the purpose of enabling such discrimination to take place. It was enacted in the context of a deep-seated and long-standing custom and habit of its people to discriminate. It assured those who desired to and did discriminate that no state governmental agency or subdivision could or would impose any sanctions upon them in respect of the discrimination. Taken together, all this amounts at least to encouragement. The State may no more encourage than it may authorize or command racial discrimination.

Third: The State has disenabled itself and all its agencies, including, of course, its courts, from acting directly against racial discrimination, or from rendering any relief in respect of a racially motivated refusal to sell, rent or lease residential property. In that way, the State has abdicated all duty or responsibility not to leave its people remediless against conduct that irreparably injures them by depriving them of their federally secured constitutional right to be free of racial

discrimination. Such a duty of protection is implicit in the Fourteenth Amendment, for without it a State could nullify a right secured under it by simply clearing out all statutory or other legal barriers in the way of desired private conduct destructive of the right. This duty of protection is repudiated in California by the operation and effect of section 26. The State has withdrawn from the field; it has rendered useless and ineffective the right of petition to the state courts for relief against the irreparable injury caused by privately effected racial discrimination. Denial of a remedy for irreparable injury wrongfully caused, is a denial of due process.

Fourth: Section 26 is not merely a repeal of the theretofore existing legislation prohibiting racial discrimination in the disposition of residential property. It goes beyond that simple operation by involving the State in private racial discrimination, and by creating a state-constitutionally secured right to discriminate. Moreover, it was adopted precisely in order to clear the way for and enable that discrimination to flourish. The State thus has sought to do by indirection, *i.e.*, by the freeing of private desires and acts, what it cannot constitutionally do directly. The indirect route is no more open to it than the direct one. The Fourteenth Amendment bars both. When repeal is the method chosen to go down the indirect route, it, too, is barred.

Fifth: In appropriate and constitutionally permissible enforcement of the Fourteenth Amendment, the Congress has guaranteed all persons the same right to make contracts and to purchase, hold and lease real property as is enjoyed by white persons. That right is not limited in its operation to infringement by the States, but applies as well to private conduct destructive or injurious

of it. Section 26 in its authorization and encouragement of a limited right of purchase, holding or leasing on the part of racial minorities, is patently inconsistent. It, therefore, falls under the Supremacy Clause.

(2) In *Snyder,* in addition to the grounds already summarized, there is another ground that supports the judgment. It is that the relief sought by petitioners and denied by the court was judicial enforcement of racial discrimination, *i.e.,* enforcement of an intended eviction of a tenant solely because he is a Negro. For the State so to use the full panoply of its judicial power in aid of a racially discriminatory design, is to deny to those against whom enforcement is sought the equal protection of the laws. A statute authorizing or commanding such evictions would clearly be unconstitutional. The case is no different, merely because the identical result is effected through action of the State's judicial rather than its legislative department. Nor is the case different because the effect of judicial enforcement of the eviction is not to compel a discriminatory decision to be made by one who, but for the compulsion of the court's process, would make a non-discriminatory decision. The result of the enforcement is, nonetheless, to impose discrimination upon its unwilling victim, whose constitutional right it is to be free of racial discrimination at the hands of the State.

ARGUMENT.

I

The State of California Has Made Racial Discrimination in the Course of Dealing in the Sale and Rental of Residential Property a Right Secured by the State Constitution. In That Way the State Has Conferred the Authority of Its Highest Law Upon the Discrimination; and Has Acted Unconstitutionally to Deny Equal Protection of the Laws to the Victims of It.

First: The statute here involved adds to the Constitution of the State of California a provision that prohibits the State and all of its governmental subdivisions and agencies from regulating or limiting the right of any owner of residential property to sell, rent or lease or to refuse to sell, rent or lease the property to such person as the owner in his absolute discretion chooses. Manifestly, the right to refuse to sell, rent or lease because of the proposed acquirer's race or religion is embraced within the absolute discretion thus given constitutional sanction.[16] The natural operation and effect of this provision—by which, of course, its constitutionality must be judged [see, *Yick Wo v. Hopkins, supra,* 118 U.S. at 373; *Near v. Minnesota,* 283 U.S. 697, 708-709; *Bailey v. Alabama,* 219 U.S. 219, 235-236; *Davis v. Schnell,* S.D. Ala. (3-judge court), 81 F. Supp. 872, 880, *affirmed* 336 U.S. 933]—is plain to see. It is, so far as it is possible for a state to make it so, to enact racial discrimination in the sale, rental and

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[16]That was the construction put upon section 26 by the State court. [R. 18, 20, 27-29.] Its construction of the State legislation is, of course, binding upon this Court. [*Cramp v. Board of Public Instruction,* 368 U.S. 278, 285, and cases there cited.]

leasing of residential property into an impregnable constitutional right.[17] The section was in fact designed to accomplish just that legitimation of the practice of racial discrimination, and thus to authorize and clear the way for it. The State's voters were authoritatively so told, when the measure was submitted to them. [See, pp. 17-18, *supra.*]

Section 26, as petitioners insistently argue [Br., 13, 17-24, 33-37], is indeed a choice of policy by the State. But, it is not the simple choice that petitioners describe, *i.e.*, only a choice to be neutral in the matter of racial discrimination; or to deal with only one part of the problem, or meet it from a gradualistic approach, enacting or leaving in force such palliative measures as fall short of prohibiting the practice. It is, rather, a conscious and intended choice to make racial discrimination possible and to make it safe to carry it on, by immunizing it from any sanctions of the law; and, in that way, to secure and authorize it. Because, as petitioners insist, it *is* a deliberate and official choice of policy by the State, there is no need in this case to engage in any protracted search for "state action." A choice has been made by the State, and that choice is the formal and official act of the governmental establishment. That is state action enough to bring it within the proscriptive reach of the Fourteenth Amendment.

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[17]As a part of article I of the state constitution, entitled "Declaration of Rights," section 26 finds itself in the company of and on a parity with such other constitutionally secured rights as freedom of speech, religion and assembly, and due process of law. [*Cal. Const.*, art. I, secs. 4, 9, 10, 13.] The intention to give the right to discriminate a preferred and secure position could not have been better evidence. Of all of the states of the Union, California is the only one that has elevated racial discrimination into a constitutional right.

Second: In the circumstances of community history and custom, resulting in *de facto* residential segregation [see, pp. 11-15, *supra*], section 26 is an encouragement of resumption and continuation of the custom. It puts behind the discriminatory custom the authority and prestige of the State.

The avowed purpose of section 26 is to permit reversion to this custom of racial discrimination and thus to permit resumption of the practice that Rumford had proscribed. That in itself is authorization of the practice—as is demonstrated by the fact that it is precisely the authorization of law effected by section 26 that was invoked below by petitioners in legitimation of their admitted discrimination. [R. 10, 72-73.]

The State, of course, may no more authorize than it may itself directly engage in racial discrimination. [See the cases cited and discussed in fn. 19, p. 26 *infra*.] Authorization, no doubt is, qualitatively, something more than mere inaction; but to find an authorization of a given practice, there need not have been a command to engage in, or an explicit approval of the practice. [See, *McCabe v. A. T. & S. F. Ry. Co.*, 235 U.S. 157, 158, 160, 162; *Simkins v. Cone Memorial Hospital*, 4 Cir. (*en banc*), 232 F. 2d 959, 968, *cert. den.* 376 U.S. 938. Also, fn. 19, p. 26 *infra*.] It may be found in a purposeful choice by the State not to stop, and in that way to evince its approval of, a practice it has the power to stop.[18]

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[18]The instant case is not one of being free to engage in racial discrimination because, by reason of the State's inaction or indifference, there has been no prohibition of it. The case is one of a deliberate choice by the State, expressed in a formal and authoritative exercise of its legislative power, not to prohibit the practice, *in order that it may be freely engaged in* as and whenever desired. That plainly is more than inaction or indifference. [See, pp. 26-27, *infra*.]

Third: Because of section 26, racial discrimination in housing accommodations in California is now permissible. It is permitted to flourish in the context of the deeply embedded community custom to which we have referred. [See, pp. 11-15, *supra.*] This governmental toleration of racial discrimination is the result of much more than legislative indifference; it is the result of the fact that the State has purposefully chosen, in order that the discrimination may go on, to pursue a policy of abstaining, indeed disabling itself, from prohibition or regulation of it. To make that policy effective the State has made racial discrimination a constitutional right. In that context, and for that purpose, the State's choice was not merely indifference or neutrality. [*Cf., Pet. Br.*, 13-14, 17-24.] It was authorization and approval. To be sure, the State compels no one to discriminate; but it enables and deliberately permits, in short, it authorizes those who want to discriminate to do so. [*Cf., Shelley v. Kraemer,* 334 U.S. 1, 19.]

Such a deliberate or conscious choice certainly involves the State in the discrimination to at least as great an extent as government was involved in the private activities with which this Court was concerned in *McCabe v. A.T. & S.F. Ry. Co., supra,* 235 U.S. 151, and *Public Utilities Com. v. Pollak,* 343 U.S. 451. In each of these cases an analogous choice was found to involve the government sufficiently to come within the reach of the Fourteenth and Fifth Amendments, respectively.[19]

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[19]In *McCabe* a state statute required separate accommodations for the white and black races on railway trains, but provided that nothing in the statute should be construed to prevent railway companies from hauling sleeping and dining cars to be

(This footnote is continued on the next page)

The short of the matter is that it is not necessary, in order to invalidate section 26, to rest decision upon any proposition that State neutrality or inaction [see *Br.*, 17-18, 33-34, 41] is the equivalent of action under the Fourteenth Amendment. Nor is it necessary to find that section 26 commands or directs racial discrimination. It is enough, to involve the State in the discrimination, when it occurs, that those who discriminate have been left free to do so by the deliberate and approving choice of the State. That choice is action; and it is certainly the equivalent of an affirmative authorization.

Fourth: Petitioners refer to *Marsh v. Alabama*, 326 U.S. 501, as a case in which the reason why the Fourteenth Amendment was applied to private conduct, was

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used exclusively by either white or negro passengers. Thus, railways were permitted but not required to provide sleeping and dining cars for whites only. That non-mandatory but merely permissive proviso, this Court said, made the denial of such accommodations to negroes by the carrier, action taken "under the authority of a state law . . ." [235 U.S. at 158, 160-162.] Section 26 similarly authorizes racial discrimination by property owners.

In *Pollak*, the Public Utilities Commission of the District of Columbia had dismissed an investigation into the practice of a privately owned streetcar company of broadcasting radio programs in its cars. The Commission's order did no more than to refuse to prohibit the practice, because, as it found, public safety, comfort and convenience were not impaired by it. Nonetheless, even though the First and Fifth Amendments "apply to and restrict only the Federal Government and not private persons . . ." this Court agreed with the reasoning of the Court of Appeals to the effect that "the action of [the company] in installing and operating the radio receivers, coupled with the action of the . . . Commission in dismissing its own investigation of the practice, sufficiently involved the Federal Government in responsibility for the radio programs to make the First and Fifth Amendments . . . applicable to the radio service . . ." [343 U.S. at 461-462.] There is in the case at bar, a closely similar interplay between the petitioners' discriminatory conduct and the State's official toleration of it.

that the private entity concerned was a "community [company town] *authorized* by the State to perform exactly the same kind of functions as a publicly owned municipality . . ." [*Br.*, 30, Italics ours.] There was not in *Marsh,* any state statute or other governmental promulgation that directed, approved or enabled the owner of the company town to operate it as a municipality. The State, however, had put the full force of its criminal law (in the form of a trespass statute) behind the suppression of speech and religion with which that case was concerned [326 U.S. at 505, 508-509]; and it had permitted (though not expressly or by any official action) the company to operate its property in effect as though it were a town. [326 U.S. at 502, 508-509, 510-511]. This Court's opinion in *Marsh* was written by Mr. Justice Black. In his dissent in *Bell v. Maryland,* 378 U.S. 226, 318, 326-327, he disagreed with the view that application of a state trespass statute to private conduct, which was an expression of protest of segregated service in a restaurant, brought the conduct within purview of the Fourteenth Amendment.

We are, therefore, entitled to reject petitioners' assertion that the state "authorization" they find in *Marsh* came from the trespass statute there involved [*Br.*, 45]; instead, we suggest, that the "authorization" in that case must have come from the state's toleration of the operation of the company town. The case at bar calls, *a fortiori,* for a finding of state authorization, since the private conduct here in issue is not only tolerated by the State, but is conduct which the State, acting officially and affirmatively, has made into a constitutional right.

II.

The State Acts Within the Meaning of the Fourteenth Amendment When, as Here, It Becomes Significantly Involved in Private Action That Impairs Fourteenth Amendment Rights.

First: "State action" within the meaning of the Fourteenth Amendment need not be a formal exercise of governmental power or an official act of the governmental establishment.[20] Private acts of a sort that if officially or formally done by the State would unquestionably come within the proscription of that Amendment, still come within it if the State can be fairly said to be involved in or responsible for them. [See, *United States v. Guest,* 383 U.S. 745, 755-756; Frankfurter, J., concurring, *Terry v. Adams,* 345 U.S. 461, 473.]

It is, no doubt, "a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. . ." Such involvement, however, need not "be either exclusive or direct . . ."; and it has been found by this Court "even though the participation of the State was peripheral,

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[20]This proposition is certainly implicit in the decisions that have effectively settled the rule that even a wholly unauthorized or unlawful act of some agent of the state may be "state action." [See, *e.g., Screws v. United States,* 325 U.S. 91, 110-112; *Monroe v. Pape,* 365 U.S. 167, 171-172; *Williams v. United States,* 341 U.S. 97, 99-101; *United States v. Price,* 383 U.S. 787, 792-793.]

Be that as it may, section 26 is a formal and official act of the State of California. It is authoritative legislation, enacted in one of the two ways by which legislation in that State may be adopted. [*Cal. Const.*, art. IV, sec. 1.] It is, therefore, "state action" in the classic sense. So, the question here is not whether the State has acted, for it has; but whether its action abridges federally-secured constitutional rights.

or its action was only one of several co-operative forces leading to the constitutional violation. . . ."[21] [*United States v. Guest*, 383 U.S. 745, 755-756. See also, *United States v. Price, supra*, 383 U.S. at 794 (fn. 7).] So, it is settled that governmental approval of or involvement in private conduct "need not reach the level of compulsion to clothe what is otherwise private discrimination with 'state action.'" [*Simkins v. Cone Memorial Hospital, supra*, 323 F. 2d at 968.]

There is no closed category of acts or conduct that will so involve the State in private racial discrimination as to make the Fourteenth Amendment applicable. [*Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 725-726.] The test is State responsibility. What that means, the decided cases show, is some contribution by the State to the carrying on of the discrimination, in the form of enablement or encourage-

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[21]Petitioners elaborate at length upon this "commonplace" that the Fourteenth Amendment acts against the States, not against individuals [*Br.*, 24-28]; in doing so they also quote from this part of *Guest*. [*Br.*, 25.] But, they omit enough of it to de-emphasize and hide the fact that this Court there recognized, as it has on many other occasions [see, pp. 30-31, *infra*], that the State by involving itself in private conduct will bring the conduct within the reach of the Fourteenth Amendment. So, too, they ignore *Guest* so far as it declares that the participation that constitutes such involvement may be only "peripheral" and need amount to no more than "*one* of several co-operative forces leading to the constitutional violation." (Italics ours.)

There is not inherent in the instant case, therefore, any request or need "to adopt such expansive jurisdiction" as that which petitioners profess to fear. [See, *Br.*, 26-27.] The limited jurisdiction that has heretofore sufficed to apply the Fourteenth Amendment to private conduct in which the State is involved, suffices here to enable this Court to determine whether the court below correctly found such involvement and if it did, whether the conduct to which that involvement related was of a sort barred to the States by the Fourteenth Amendment.

ment or approval of it.[22] It is, we submit, not gainsayable that the State may not act to encourage racial discrimination by those over whose conduct it has the power of control and regulation. [See, *e.g., Lombard v. Louisiana, supra,* 373 U.S. 267; *Anderson v. Martin, supra,* 375 U.S. 399.]

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[22]Among the many kinds of conduct that have been held to amount to State involvement are: Exhortations by city officers not to protest racial segregation and which thereby encouraged private persistence in segregated operation of a cafe [*Lombard v. Louisiana,* 373 U.S. 267, 269-270]; the inciting or encouraging effect, in view of known private attitudes, of requiring the race of candidates to be printed on election ballots [*Anderson v. Martin,* 375 U.S. 399]; the interplay of private and state acts bringing about subjection of negroes to private reprisal as the consequence of State-compelled disclosure of their membership in a locally unpopular organization [*N.A.A.C.P. v. Alabama,* 375 U.S. 449, 463]; leasing premises upon which private discrimination takes place, though the discrimination is not commanded or suggested by the State [*Muir v. Louisville Park Theatrical Assn.,* 347 U.S. 971, *reversing* 6 Cir., 202 F. 2d 275; *Burton v. Wilmington Parking Authority, supra,* 365 U.S. 715; *Derrington v. Plummer,* 5 Cir., 240 F. 2d 922, 925-926]; encouraging use of racially discriminatory deed covenants, by allowing damages for breach [*Barrows v. Jackson,* 346 U.S. 249, 254]; administering a discriminatory private trust [*Pennsylvania v. Board of Directors,* 353 U.S. 230]; substituting private persons for a city as trustee of a private trust in order to permit discriminatory operation of the trust property [*Evans v. Newton, supra,* 382 U.S. 296]; financial assistance to businesses or establishments in which discrimination is carried on [*Simkins v. Cone Memorial Hospital, supra,* 323 F. 2d at 965-968]; permitting private regulation of primary elections, without any governmental control or suggestion, but for the implicit purpose of excluding negroes [*Terry v. Adams, supra,* 345 U.S. at 465-466, approving *Baskin v. Brown, supra,* 174 F. 2d 391, and *Rice v. Elmore, supra,* 165 F. 2d 387]; permitting or tolerating discrimination under authority but not the compulsion of state law [*McCabe v. Atchison, etc. Ry. Co.* 235 U.S. 151, 161-162; and *cf., Public Utilities Com. v. Pollak, supra,* 343 U.S. 451, and *Marsh v. Alabama,* 326 U.S. 501]; permitting *de facto* school segregation caused by neighborhood private residential patterns [*Jackson v. Pasadena School Dist., supra,* 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878; *Branche v. Board of Education,* E.D.N.Y. 204 F. Supp. 150]; encouraging discrimination by burdening integrated operation of places of public accommodation. [*Robinson v. Florida,* 380 U.S. 153, 156-157.]

Contrary to petitioners' assertions [*Br.*, 30-31, 33, 38-39, 45-47], the cases in which state involvement has been found, have not been only those that, to use petitioners' language, "deal with the rights of a citizen *vis-a-vis* his government . . ." [*Br.*, 31.] There are quite a few cases that are not so confined. The right of a person not to be segregated out of a private cafe, or private recreational facility, is not a right "*vis-a-vis* his government" in petitioners' meaning; but, if the private enterprise is conducted in or on property that is leased from the State, and even though the segregation is not coerced or affirmatively authorized or encouraged by the State, it may well be that the State is involved in the discrimination. In that event, the Fourteenth Amendment applies. [See, *e.g.*, *Burton v. Wilmington Parking Authority*, *supra*, 365 U.S. 715; *Muir v. Louisville Park Theatrical Assn.*, *supra*, 347 U.S. 971; *Derrington v. Plummer*, *supra*, 240 F. 2d 922.] Similarly, the right not to have to listen to a radio program while riding on a streetcar, is not one that is ordinarily one *"vis-a-vis"* the government, but government can be involved in it without going to the length of compelling the program to be broadcast. [*Public Utilities Com. v. Pollak*, *supra*, 343 U.S. 451.] Too, the right to be free from private reprisal because of membership in an unpopular organization, is not a right *"vis-a-vis"* the government; but, if a member suffers such reprisal by reason of governmentally compelled disclosure of his membership, there is such an interplay between the private and governmental acts as to bring the case within the Fourteenth Amendment. [*N.A.A.C.P. v. Alabama*, *supra*, 375 U.S. 469.]

Even if petitioners' argument were sound, its condition of private activity in the nature of a governmental function is met in the case at bar. [See, also, pp. 53-54, *infra.*] Zoning or districting of residential areas in a community is just as much of a governmental function as conducting an election or operating a park, a swimming pool or golf course. And, as Mr. Justice Black has said in explaining the grounds of the holding in *Shelley v. Kraemer, supra,* 334 U.S. 1, a private deed restriction confining ownership or occupancy of land to whites, "was in reality the equivalent of and had the effect of state and municipal zoning laws. . . ." [*Bell v. Maryland, supra,* 378 U.S. at 328-329, Black, J., diss.]

So is it with the private conduct here involved. It tends to bring about, in California it has brought about, residential zoning on racial lines as effectively as though commanded by law. [See, pp. 11-15, *supra.*] It, too, is, as the private conduct in *Shelley* was, "in reality the equivalent of and [has] the effect of state and municipal zoning laws." [See, also, St. Antoine, *Color Blindness But Not Myopia,* 59 Mich. Law Rev., 993, 999-1001, 1013-1014.]

Perhaps there are factors other than racial prejudice or bigotry that bring about the discrimination which contributes to the creation and continuation of *de facto* residential segregation. [*Br.*, 42-43.] It may be, of course, the result of putting a higher value on economics than on morality or tolerance; or the result of any one or combination of many causes. [See, pp. 12-13, 15 (fn. 12), *supra.*] But, whatever the cause of the discrimination, it surely cannot be merely a coincidence that there are racial ghettos, not only in California, but in

every urban area of the land. A court may fairly indulge the inference that the concentration of Negroes into a few districts, and their absence from those that are white is a condition that was brought about primarily, if not entirely, by the refusal of the great preponderance of white property owners to sell or lease to Negroes any residential property in a white section. That is discrimination in fact, whatever may be its subjective motivation. And surely it cannot be denied that cessation of a wide-spread practice of refusal would go a long way in the direction of preventing the spread of existing or the creation of new *de facto* segregation.

No doubt, zoning is usually accomplished by legislation or regulation that is coercive. The manner in which elections shall be conducted is also usually the subject of mandatory legislation, as are also the regulations pursuant to which government will operate parks and other public facilities whose operation it undertakes. But these functions may also be carried on by private persons; and when the question of state involvement depends on the nature of the function, the test is equivalency of result. Certainly, the private conduct of elections, of the sort that was interdicted in the "white primary" cases [see, pp. 50-53, *infra*], was not the exact duplicate of their conduct by government, especially in the circumstance that the rules and restrictions of the private variety were voluntary, instead of being coercive, as equivalent governmental regulations usually are. In general, and particularly in result, however, the two were equivalents; and so, when coercive or mandatory governmental regulation of the private activity was repealed to permit a discriminatory,

voluntary private operation, government became significantly involved.

Second: The State Supreme Court concluded that the State of California was significantly involved in the discrimination complained of at bar. [R. 20-29.] This conclusion is firmly grounded in the facts of the purpose for which section 26 was adopted and of its natural operation and effect to encourage racial discrimination by owners of residential properties. The conclusion is reinforced by the familiarity with local customs, conditions and practices of the State's people and businesses that the State Supreme Court must be deemed to have.

(1) Enablement and encouragement of the practice of racial discrimination in housing property was the object for the consummation of which section 26 was adopted. [See, pp. 17-18, *supra.*] The effects of section 26 go farther than the comparatively few instances of discrimination shown in the instant record. Section 26 is not a transient or temporary stop-gap. It is a part of California's organic law, designed to set a lasting standard. As such, it serves to preserve and extend the existing *de facto* segregation of the races. It strengthens and puts the seal of constitutional approval upon the established and readily expandable community custom of residential segregation. [See, Donnici, *The Decline and Fall of California's Proposition 14,* 1 Univ. of San Francisco L.R. 12, 20-22, 47-48.]

Official legislative zoning along racial lines would be undoubtedly unconstitutional. [*Buchanan v. Warley,* 245 U.S. 60; *Harmon v. Tyler,* 273 U.S. 668 (reversing *per curiam, Tyler v. Harmon,* 158 La. 439, 104 So. 200, 160 La. 943, 107 So. 704); *Birmingham v. Monk,*

5 Cir., 185 F. 2d 859, 862, *cert. den.* 341 U.S. 940; *Richmond v. Deans,* 4 Cir., 37 F. 2d 712, *affirmed* 281 U.S. 704.] It should be just as unconstitutional when, even though only *de facto,* the result is attained with the sympathetic encouragement of the State. The encouragement to racial segregation that section 26 gives is "one of the several cooperative forces" [*United States v. Guest, supra,* 383 U.S. at 755-756] that have led and will continue to lead to such segregation. [See, pp. 25-26, *supra.*]

(2) The natural operation and effect of section 26 is to encourage racial discrimination in residential housing. It was adopted against the background of a long and persistent history of such discrimination in the State; a background of an existing and embedded community custom of discrimination that had developed with much help from government. [See, pp. 11-15, *supra.*] The desire and will of a substantial number of people to discriminate was obviously puissant and ready to emerge as action, though held in check, at the time of the section's enactment, by recent proscriptive legislation and a growing judicial tendency to proscribe the discrimination, even without express statutory warrant. [See, pp. 15-16, *supra.* Also fn. 28, p. 47, *infra.*] Section 26 did much more than remove this check upon that desire or custom. It made action in furtherance of the desire immune from the law's sanction, existing or future; and it gave the actors official assurance that there would and could be no redress against them for racially discriminatory acts.

This was not mere neutrality, for it operated to the benefit and in aid of those whose known attitudes made it likely, indeed virtually certain, that they would

act in only one way—to discriminate. It is one thing to do nothing, one way or the other, thus leaving individual conduct to the unforced or uninfluenced preference and choice of the actor. It is quite another to assure those known to favor and to want to engage in a specific form of conduct, that they may do so without fear or let. The one may be neutrality or only indifference to the result. The other is an encouragement.

Surely, there is as much encouragement of racial discrimination in section 26 as there was in the hortatory shouts of the town officials in *Lombard* (*supra*, 373 U.S. 267), or the unadorned statement of a candidate's race in *Anderson* (*supra*, 375 U.S. 399). The short of the matter is that section 26 encourages racial discrimination, because it lets down the bars against the practice, makes exercise of it a secured and inviolable constitutional right and, in the context of established and long-standing community custom, puts the State's prestige and authority in the scales against any prohibition or regulation of the custom.

Third: It will bear some emphasis that this is not a case in which it is contended that the Fourteenth Amendment, of itself, forbids a State to enforce a general, non-discriminatory criminal statute against violators of it in situations involving protest of private racial discrimination. [*Cf.*, Black, J., dissenting, in *Bell v. Maryland*, 378 U.S. 226, 318.] Here, the Fourteenth Amendment is invoked against the State's involvement in private racial discrimination—an involvement that stems from an enactment that is not non-discriminatory, but one that was designed and enacted in contemplation of racial discrimination, and purpose-

fully intended to operate as an enablement and constitutional validation of it. More nearly apposite to that kind of a situation are the cases like those already cited [pp. 29-32, *supra*], in which some encouragement of or impetus toward racial discrimination was given by state legislation, administrative regulation, or other official approval. [see, also, *e.g., Robinson v. Florida, supra,* 378 U.S. at 155-157; *Peterson v. Greenville,* 373 U.S. 244, 247-248; Black, J., dissenting, *Bell v. Maryland, supra,* 378 U.S. at 326-328; White, J., concurring, *Evans v. Newton,* 382 U.S. 296, 305.]

Fourth: The question here is not, as petitioners would have it, how or to what extent or in what way the State should meet the problem of racial discrimination. [See, *e.g., Br.,* 33-37.] The question is whether the Fourteenth Amendment prohibits a State from involving itself in and on the side of such discrimination. The answer to that question has been put beyond doubt by this Court. [see, *e.g.,* the cases cited, fns. 22, 26, p. 31, *supra,* and p. 44, *infra.*] It may be that it is permissible for the State to remain inert or inactively neutral in the face of discrimination [but see, pp. 40-47, *infra*]. It is certain, however, that if the State does act, its action cannot be in favor of discrimination. When it comes to racial discrimination, a State's action can only be against it.

Section 26 is undeniably state action. [See, fn. 20, p. 29, *supra*]. More than than, it is affirmative action on the side of discrimination, not simply an innocuous declaration of neutrality. [See, pp. 23-24, 26, *supra.*] There is therefore, no room here for any deference to a legislative judgment on debatable issues of fact and

policy. [See, *Br.*, 28-37.] The supreme policy of the land in respect of racial discrimination has been established by an authority that no one State and no number of its voters, however large, may repudiate.

Fifth: Petitioners badly overstate the record when they say that the State Supreme Court fixed State involvement or responsibility "solely because in adopting Section 26 the people of California had 'nullified' previously enacted legislation prohibiting such conduct . . ."; and that it was "this sequence of legislative activity alone that the court below ultimately relied upon . . ." [*Br.*, 37.] Even if that were a correct epitome of the Court's discussion and conclusion on the subject of involvement or responsibility, it would be immaterial. This Court is not confined to the grounds of decision relied upon by the lower court. A successful party below may sustain its judgment on any ground that finds support in the record. [*Oklahoma v. United States Civil Serv. Co.*, 330 U.S. 127, 134 (fn. 3).]

In point of fact, however, state involvement or responsibility was found by the State Supreme Court for reasons quite different from the purported reason suggested by petitioners. For instance, section 26 was found to constitute state involvement because, *i.a.*, it provided for "a purported constitutional right to privately discriminate . . ." [R. 20]; the aid of the State's legislation was invoked to consummate and validate racial discrimination [R. 22-23]; and, the racial discrimination was accomplished with the culpable permission of the State, which had abdicated its traditional governmental functions for the obvious purpose of condoning the private discrimination. [R. 23-24.]

III

Since the Fourteenth Amendment's Prohibition Upon the States Imports a Duty on Their Part to Protect Those Within Their Jurisdiction Against Abridgement or Impairment of the Rights Secured by the Amendment, Repudiation by a State of Its Duty of Protection Is Action Within the Amendment's Reach.

The Fourteenth Amendment "granted the right to be free of racial discrimination . . ." [*Terry v. Adams, supra,* 345 U.S. at 468.] No doubt, that grant, so far as the direct operation of the Amendment is concerned, is a limitation upon state rather than private action; but its "aims" [see, *Katzenbach v. Morgan, supra,* 384 U.S. at 657], are more comprehensive. It imports a policy to eliminate from the communal life of the nation the divisive consequences of racial discrimination; and to secure to the individual a right that may be fully enjoyed and made to accomplish the purpose of freeing him from subjection to the injurious personal results of racial discrimination. That much is certainly implicit in the nature of the right; it has been made evident by this Court's determination, in *United States v. Guest, supra,* 383 U.S. at 761-762, 778-779, 781-783, that pursuant to the power given Congress to enforce the right, admittedly a prohibition on only the States, it is permissible to proscribe private action that is destructive of it. [See, also, pp. 55-60, *infra.*]

The State, of course, may not itself infringe the right to be free of racial discrimination. [Cases cited, fn. 26, p. 44, *infra.*] It involves no stretching of the Amendment's language or its fair import, therefore, to conclude that, to prevent denigration of the right it se-

cures, the State must protect its holder in the full enjoyment of it, and not leave him remediless against conduct invasive of it. [*Truax v. Corrigan,* 257 U.S. 312, 329-330. See, *Buchanan v. Warley, supra,* 245 U.S. at 77-78; *Marbury v. Madison,* 1 Cranch 137, 163.] A good many decisions may be brought together in support of the proposition just stated. The necessary rationale of the decisions is that there is a duty upon the State to protect the persons within its jurisdiction against conduct it has the power to proscribe, which conduct, even though it is not commanded by the State, will have the practical effect of abridging or denying full enjoyment of the constitutionally secured right.[23]

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[23]". . . The very highest duty of the States," this Court has said, is "to protect all persons within their boundaries in the enjoyment of these 'unalienable rights with which they were endowed by their Creator' . . . The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power . . ." [*United States v. Cruikshank,* 92 U.S. 542, 553, 555.] Mr. Justice Bradley, the author of the prevailing opinion in the *Civil Rights Cases,* 109 U.S. 3, in a letter to Circuit Judge Woods, said of the Fourteenth Amendment that ". . . denying the equal protection of the laws includes the omission to protect as well as the omission to pass laws for protection . . ." [Quoted by Mr. Justice Goldberg concurring in *Bell v. Maryland,* 378 U.S. 226, 309-311.] That letter had its effect, Judge Woods used its exact language in *United States v. Hall,* 26 Fed. Cas. 79, 81 (No. 15,282), in holding it was a violation of the Civil Rights Act of 1870 to prevent and hinder exercise of the constitutionally protected rights of speech and assembly.

The failure of State officers to protect one in their custody from the assault of a mob of private persons, it has been held, is a denial of Fourteenth Amendment rights. [*Lynch v. United States,* 5 Cir., 189 F. 2d 476, 479-480, *cert. den.* 342 U.S. 831; *Catlette v. United States,* 4 Cir., 132 F. 2d 902, 907.] In *United States v. Given,* 25 Fed. Cas. 1324 (No. 15,210), it was held to be a violation of the Civil Rights Act of 1870 for a tax collector to fail to collect a tax, for the nonpayment of which the right to vote was lost; the Court saying, that a "practical denial and abridgement" of the constitutional right was effected

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A duty of protection is a necessary corollary of the prohibition directed at the states. Unless there is such a duty upon the State's part, the Amendment is sapped of its vitality and its prohibitions are eroded into little more than a precatory admonition. If there is no such duty, means of violating the Amendment without consequent federal sanctions are put in the State's hands [*cf., Cooper v. Aaron,* 358 U.S. 1, 18; *Ex parte Virginia,* 100 U.S. 339, 347]; then, to evade the Amendment, the State need only clear the way for private violation of the right and merely look the other way when it occurs.[24]

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by the State's "indifference, refusal to pass such laws as harmonize with and aid in making [the right] available and secure to all citizens . . ."

A duty to remedy racial segregation in public schools, notwithstanding it was caused by residential segregation which was itself the result of private action, rather than of governmental doing, was found in *Branche v. Board of Education,* E.D.N.Y., 204 F. Supp. 150, 153. [To the same effect is *Jackson v. Pasadena School District, supra,* 59 Cal. 2d 876, 382 P. 2d 878, 31 Cal. Rptr. 606.] And in *Tate v. Department of Conservation,* E.D.Va., 133 F. Supp. 53, 61, *affirmed* 4 Cir., 231 F. 2d 615, it was said that when a State leased its property for operation of a park by private operators, the State had "to see that the park was operated by the lessee without discrimination."

[24]That is the way some States sought to deny Negroes the right to vote in party primaries—*i.e.,* by repealing all laws that stood in the way of treating the primary as the internal activity of a private club, and standing "neutrally" by while that private activity was kept closed to Negroes. That sophisticated attempt at escaping the command of the Fourteenth Amendment against denial of equal protection of the laws did not pass judicial scrutiny. [*Baskin v. Brown,* 4 Cir., 174 F. 2d 391; *Rice v. Elmore,* 4 Cir., 165 F. 2d 387, *cert. den.* 333 U.S. 875. And, see, *Terry v. Adams, supra,* 345 U.S. at 465-466.] See, also the comments of Senator Pool concerning the scope of the Fifteenth Amendment, that are quoted in the appendix to this Court's opinion in *United States v. Price, supra,* 383 U.S. at 809-811, and in which he anticipated State attempts at nullification of the Amendment by the expedient of omitting to protect the rights secured by it.

All this does not mean that a State is required to enact legislation proscriptive of racial discrimination or that is otherwise preservative of the constitutional right. [See, *Br.*, 36-37.] What it does mean is that if, by private conduct over which the State has the power of control, the right is infringed, the State must provide a remedy for it. If it does not, its choice not to protect the right involves it in the infringing conduct sufficiently to bring the Fourteenth Amendment into operation. The conduct, being then the equivalent of direct action by the State, may be the subject of such relief as will serve to make the infringed right fully effective. More than that, the expression of the State's choice, which in the instant case is, of course, section 26, is invalid, because it offends the command of the Amendment.[25]

Section 26 puts California in the position of repudiating any duty to provide such a remedy; and thereby it abridges the constitutional rights of respondents and others like them who, solely because of race, are being and have been subjected to discriminatory action in which the State is involved. The section disenables the State from providing any remedy for the injury inflicted upon a person by such discriminatory action. In consequence of this repudiation, it subjects persons to the imposition of irreparable injury upon them, and

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[25]A court of equity, state or federal, would have ample power to frame an appropriate decree. Cogent examples are at hand in the reapportionment and school-segregation cases. There it has not been felt to be enough simply to strike down the offending statute or regulation. The courts, in order to make the protected right effective, may also delineate the shape and order the adoption by the State of a constitutional substitute. [See, *e.g.*, *Brown v. Board of Education*, 349 U.S. 294; *Reynolds v. Sims*, 377 U.S. 533, 585; *Silver v. Brown*, 63 Cal. 2d 270, 278, 281-280, 405 P. 2d 132, 138, 140, 46 Cal. Rptr. 308, 314, 316.]

leaves them remediless in the premises. Through section 26 the State has withdrawn itself completely from the field of preventing racial discrimination in the sale, leasing or rental of housing property.

No search for "state action" need be made to bring this repudiation of a constitutionally imposed duty within reach of the Fourteenth Amendment. It is the product of the State's formal and official legislative action. Its result is a denial to racial groups of the law's protection against discrimination directed at them on account of their race. The unacceptability of race as a basis of classification under the Equal Protection Clause is now beyond possible dispute.[26]

Absent an applicable remedial statute, reparation for irreparable injury inflicted by private racial discrimination would normally be sought in the State's courts. Denial or refusal by the State of an effective remedy for irreparable injury inflicted, even though thorough private means, by invasion of a constitutional right, is a denial of due process of law, contrary to the Fourteenth Amendment [*Truax v. Corrigan*, 257 U.S. 312, 329-330. *Cf., Jackson v. Pasadena School Dis-*

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[26]The Fourteenth Amendment guarantees "the right to acquire and possess property of every kind . . . to dispose of it and to live upon one's own land, all "without discrimination on account of color, race, religion . . ." [*Buchanan v. Warley, supra*, 245 U.S. at 62-63, 64.] The first Mr. Justice Harlan's reference to the color-blindness of the Constitution [*Plessy v. Ferguson*, 163 U.S. 537,] has been carried into the modern decisions so firmly as to put racial discrimination beyond the legal pale in virtually every conceivable situation. [See, *e.g., Shelley v. Kraemer*, 334 U.S. 1; *Barrows v. Jackson*, 346 U.S. 249; *Brown v. Board of Education*, 347 U.S. 483; *Oyama v. California*, 332 U.S. 633, 639-640; *Burton v. Wilmington Parking Authority, supra*, 365 U.S. 715; *Terry v. Adams, supra*, 345 U.S. 461; *Anderson v. Martin, supra*, 375 U.S. 399; *Evans v. Newton*, 382 U.S. 296; *Pennsylvania v. Board of Directors*, 353 U.S. 230.]

trict, supra, 59 Cal. 2d 876, 382 P. 2d 878, 31 Cal. Rptr. 606.] "The very essence of civil liberty," said Mr. Chief Justice Marshall, "certainly consists in the right of every individual to claim the protection of the law whenever he receives an injury. One of the first duties of government is to afford that protection . . ." [*Marbury v. Madison, supra,* 1 Cranch at 163.] The right of access to the courts, there to claim that protection, is, of course, a right guaranteed by the Due Process Clause of the Fourteenth Amendment. [*Truax v. Corrigan, supra,* 257 U.S. at 329-330; *Brinkerhoff etc. Co. v. Hill,* 281 U.S. 673, 677-679.] It is, indeed, a form of the right to petition for a redress of grievances, secured by the First and incorporated into the Fourteenth Amendment. [*Brotherhood of R. Trainmen v. Virginia,* 377 U.S. 1, 5-8; *N.A.A.C.P. v. Button,* 371 U.S. 415, 429-430. *Cf., Thomas v. Collins,* 323 U.S. 516, 531; *Eastern R. R. Conference v. Noerr Motor Freight,* 365 U.S. 127, 136, 138.]

This right is abridged by section 26, for it denies any remedy whatever for injury caused by racial discrimination in housing, and it forestalls any effective access or petition to the State courts in that regard by prohibiting in advance any limitation upon the property owner's absolute discretion to refuse, for reasons of race, to sell, lease or rent.[27]

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[27]That prohibition is more than a mere legislative definition of what is or is not under State law an actionable wrong. It is the denial of any remedy in the State courts for an injurious invasion of the federally secured constitutional right to be, as was said in *Terry v. Adams, supra,* 345 U.S. at 468, "free of racial discrimination." It is this practical abridgement of a *federal* right which distinguishes the case, in respect of the right to petition the courts, from the case of a legislative definition, as a matter of local law, of the wrongs that may be redressed

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This forestalling effect operates in two ways. The first of these is that it prevents recognition in the State court of a cause of action under the Fourteenth Amendment for injurious conduct in which the State is sufficiently involved to make the Amendment applicable. It is not enough to defeat such a cause of action that the State has no remedial statute. The Fourteenth Amendment binds the State courts fully as much as it does any other department of government. [*Shelley v. Kraemer, supra,* 334 U.S. at 14-18.] The courts could not constitutionally refuse recognition of a cause of action properly made out under the Amendment. Section 26 compels refusal of such recognition, and so offends against the Amendment.

The second of the forestalling effects is that section 26 prevents the State courts from working out as a matter of the State's common or decisional law, a remedy for injurious racial discrimination. Without section 26, it was open to the State courts to work out a cause of action for injurious racial discrimination, proceeding "on principles of private justice, moral fitness and public convenience, which when applied to a new subject, make common law without a precedent . . ." [Willes, J., in *Millar v. Taylor,* 4 Burr. 2302, 2312, 98 Eng. Rep. 201. *Cf.,* Douglas, J., concurring in *Lombard v. Louisiana; supra,* 373 U.S. at 275-277.] Indeed, at the time section 26 was adopted the State Supreme Court was only a short step away from recognizing a

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in the state courts. In the latter case, the legislation is addressed to intererests of purely State provenance. [Compare *South Carolina v. Katzenbach,* 383 U.S. 301, 325, quoting *Gormillion v. Lightfoot,* 364 U.S. 339, 341, to the effect that exercise of a State's reserved powers is not insulated from *Federal* review when the "state power is used as an instrument for circumventing a federally protected right."

cause of action for privately caused injurious racial discrimination.[28]

Section 26 has rendered nugatory any chance the respondents may have had, by appropriate petition to the State courts, to bring about recognition of such a cause of action.[29] *Truax v. Corrigan, supra,* 257 U.S. 312, is in point in the present connection. There it was held to be a denial of due process for a State to deny the remedy of injunction against private conduct that invaded another's constitutional right of liberty and property. ". . . To give operation to a statute," this Court said, "whereby serious losses inflicted by such unlawful means [libelous statements] are in effect made remediless is, we think, to disregard fundamental rights of liberty and property, and to deprive the person suffering the loss of due process of law." At bar, the irreparable injury that ensues upon the subjection to racial discrimination need not be labored. It is a fact alleged and, for purposes of the litigation, admitted in the two cases that are here. [R. 4, 54; see, pp. 7-8, *supra.*] The persons suffering those losses are made remediless by section 26. In that way, the State has acted to deny respondents due process of law.

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[28]See, *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329, and *Williams v. International Brotherhood,* 27 Cal. 2d 586, 165 P. 2d 903, recognizing a right to relief in respect of racially motivated exclusion from a labor union. The reasoning by which that result was achieved is just as applicable to a racially motivated refusal to sell or rent residential property. Substitute "home" for the references "job" in the opinions and the applicability of the reasoning will become clearly apparent.

See, also, *Jackson v. Pasadena City School District, supra;* 59 Cal. 2d 876, 382 P. 2d 878, 31 Cal. Rptr. 606, in which, notwithstanding the absence of an applicable statute, relief was given in respect of *de facto* school segregation produced by *de facto* residential segregation.

[29]It may bear repeating that this is not merely an instance of a legislative determination not to recognize as action-

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IV

Repeal of Existing Legislation Prohibitory of Racial Discrimination, for the Purpose of Clearing the Way for Resumption and Continuation of the Discriminatory Practices, Is Itself an Unconstitutional Denial of Equal Protection of the Laws to Those Injuriously Affected by the Practices.

It is the persistent contention of petitioners [*Br.*, 23-24, 28, 37] that Section 26 does nothing more drastic than to repeal, by implication, California policy to prohibit racial discrimination in the sale and rental of housing accommodations—the policy embodied in the Rumford and Unruh Acts. [See, pp. 17-18, *supra.*] That is an oversimplification of the natural operation and effect, as well as of the purpose, of Section 26. [See, pp. 17-27, *supra.*] Even if it is not, the constitutionality of the section is not saved by treating it as only a repealing act. In an appropriate context, repeal of an existing policy may be unconstitutional. Such a context exists when repeal is the means of effectuating the State's deliberate choice to enable a result, constitutionally barred to the State, to be reached indirectly by private action and to clear the way for such action by doing away with prohibitions that serve to prevent private invasion of constitutional rights, and by formally severing any apparent connection of the State with the invaders. In other words, the State does not succeed in evading constitutional restraints by purposefully clear-

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able, given conduct that is wholly within the regulatory control of the State. It is a denial of a remedy for injurious impairment of a *federally* secured right. That is what distinguishes it from cases—*e.g.*, *Silver v. Silver*, 280 U.S. 117, 122—holding it within a State's competency to abolish rights recognized by the common law. [See, note 27, p. 45, *supra.*]

ing the way for accomplishment, through private rather than official action, of the unconstitutional objective of denying equality of treatment to racial minorities. *Evans v. Newton,* 382 U.S. 296, and the so-called "white primary" cases [see fn. 24, p. 42, *supra*] fully document the proposition just stated.

First: In *Evans,* the state court seemingly did no more than to accept the resignation of a city, as trustee of a trust of land to be used as a park for white women and children, and to appoint private persons in the City's stead as trustees. Yet, that action by the court was held to be unconstitutional state action within the meaning of the Fourteenth Amendment. What made it so, was the discriminatory purpose that underlay it —the purpose to clear the way for what the City could not itself directly participate in, a segregated operation of the park. Had it been thought, it was said in the majority opinion of this Court, that even the private trustees could not lawfully operate the park on a segregated basis, "the resignation would not have been approved and private trustees appointed . . ." [382 U.S. at 302; and see, also White, J., concurring, 382 U.S. at 303.] From that fact, the inference of discriminatory purpose was drawn. The state's involvement in the purpose was fatal to its action.[30]

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[30]The parties, and the United States as *amicus curiae,* briefed the case as one in which the State action involved was infected with unconstitutionality because of the discriminatory purpose that motivated it. That was the thrust of the statement of the question involved, as stated in the petition for certiorari. In its epitome of the case, the United States characterized it as one in which the State "has acted to transfer [the park] to private hands *in order to perpetuate segregation* . . ." as a consequence of which "the State bears substantial responsibility for the racial discrimination now enforced by the trustees, albeit they are

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Whatever doubt there may have been about the existence of the purpose in *Evans* [see Black, J. dissenting, 382 U.S. at 313-314], there can be none at bar; for here the legislative purpose to permit restoration and continuation of private discrimination is documented beyond dispute by the official explanations of the statutory purpose of section 26, which its proponents vouchsafed to the electorate, as well as by the events that brought about its submission and adoption, and by its natural operation and effect. [See, pp. 15-18, *supra.*] The factual premise upon which the majority in *Evans* acted exists in the case at bar. The purpose to clear the way for private discrimination by enactment of section 26 has been made very clear. [See, pp. 17-18, *supra.*] Here, as there, the State cannot evade responsibility for bringing about that which it desired and intended to bring about and which could not have been lawfully brought about without the State's timely and effective intervention.

Second: The white primary cases illustrate the technique that this Court in *Evans* found to be unavailing to dissociate the state from racial discrimination it purposefully permits. These cases show that even repeal may be unconstitutional action, if its purpose is to aid or encourage or enable private persons to do that which the Fourteenth Amendment denies to the State acting *qua* State. Outstanding in this regard, is the South Carolina effort to disenfranchise negroes—a story that is told in *Rice v. Elmore, supra,* 165 F. 2d 287, and *Baskin v.*

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nominally a private board . . ." [*Brief for United States,* p. 26 (italics ours)]. The respondents summed up their case with the comment that it is "not the proper business of any public authority to act affirmatively to clear the way for discrimination . . ." [*Respondents' Reply Brief,* p. 1.]

Brown, supra, 174 F. 2d 391—decisions to which this Court gave its approval in *Terry v. Adams,* 345 U.S. 461, 465-466.

South Carolina's method was a simple one. After *Smith v. Allwright,* 321 U.S. 649, made it seem likely that the State's legislatively designed primary system was open to the constitutional flaw this Court had exposed in the Texas system, South Carolina repealed "every trace of statutory or constitutional control of the Democratic primaries . . ." [*Terry v. Adams, supra,* 345 U.S. at 465-466.] The purpose of repeal, of course, was to bring about exclusion of Negroes from the primary by private action, leaving no apparent connection between that action and the State, by way of delegation or grant of authority, direction or control. So far as the State was concerned, it had simply repealed its policy of regulating and controlling primaries, and had assumed a neutral stance. It was, however, the readily inferable purpose of this device to make it possible for the Democratic Party, as a private organization and by its voluntary and uncontrolled choice, to effect the exclusion that the State as such could not. That purpose brought the ensuing private action within the proscriptive reach of the Fourteenth Amendment, as the following quotation from *Baskin v. Brown, supra,* 174 F. 2d at 393, shows:

> ". . . The devices adopted showed plainly the unconstitutional purpose for which they were designed; but, even if they had appeared to be innocent, they should be enjoined if their purpose or effect is to discriminate against voters on account of race . . ."

The Texas experience similarly shows that purposeful repeal may be unconstitutional action. In that state, primaries were legislatively regulated. The regulatory statute excluded negroes from participating in Democratic primaries. This Court held the statute unconstitutional. [*Nixon v. Herndon,* 273 U.S. 536.] The statute was then repealed and one enacted by which control of voting qualifications was given over to the party Executive Committee, ostensibly a private organization. That effort, too, was nullified by this Court. [*Nixon v. Condon,* 286 U.S. 73.]

The next move then, was an effort to accomplish the exculsory purpose entirely by private action; and so, the State Convention of the Democratic Party, acting without any authority, delegation or grant from the State, defined the Party membership as consisting of all qualified white voters. It was this apparently private action, in which the State had no part, that this Court, in *Smith v. Allwright, supra,* 321 U.S. 649, invalidated on the ground that the constitutional right to vote could not be nullified "by casting [the State's] electoral process in a form which permits a private organization to practice racial discrimination in the election . . ." [321 U.S. at 664.]

Third: These cases are not merely an *ad hoc* expedient to assure Negroes of equal voting rights. Implicit in them is a viable principle of constitutional law, capable and deserving of general application in the field of racial discrimination. This principle is that the State unconstitutionally involves itself in private racial discrimination when it designedly withdraws from the field in order to permit private accomplishment of the

discrimination in which it cannot itself directly participate.

The factual context in which the instant case arises, calls for application of this principle. The voters were officially told, as a reason why they should adopt section 26, that it would restore the *status quo ante* Rumford Act. Then, the property owners had the right, taken away by Rumford, to "refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin or ancestry." [see, pp. 17-18 *supra.*] This was not just repeal; not just a change of policy from anti-racial discrimination to one of neutrality. It was a purposeful choice to restore and give free scope to the established community custom of racial discrimination. In that view of the matter, California's essay at repeal is just as vulnerable on constitutional grounds as were the similarly motivated efforts of South Carolina and Texas in the electoral field or Georgia's in the operation of its park.

Fourth: To be sure, the holding of a political election is a governmental function in which all have a constitutional right to participate upon equal terms. And, a State-operated park is a public facility to use of which, as against the State, all have an equal right. [*Br.*, 30-33.] These facts do not differentiate the cited cases from the one at bar. Indeed, they underscore the applicability to our facts of the principle upon which the decisions are grounded; for they show that *constitutional rights* will not be permitted to be nullified by private action, when the State has had some fair share of responsibility for bringing about or permitting the nullification.

People, no doubt, have a constitutional right to equality of voting and of access to public facilities. They also

have a constitutional right to be free of racial discrimination generally; and in particular, to be free of it in the acquisition, ownership and enjoyment of property. [Cases cited, pp. 40, 44 (fn. 26), *supra.*] So do they have a constitutional right not to be segregated into racial living zones or districts [cases cited, pp. 36-37, *supra*] or schools [*Brown v. Board of Education, supra,* 347 U.S. 483.]

These rights are as much entitled to vindication and protection as those involved in the primary cases or in *Evans.* Zoning or districting of a community is as much a governmental function as regulation of a primary election or operation of a park. [See, pp. 33-35, *supra.*] If the latter may not constitutionally be left in private hands for accomplishment of a discriminatory purpose, neither may the former. In either case, the purpose of leaving the matter to private discretion and the effect of what is done, is to nullify or impair the right. In either case, the overriding restraints of the Fourteenth Amendment may not be so easily or cynically loosened.

It is a superficial analysis of the cases to differentiate *Evans* and the white primary decisions on the ground that they involved the private exercise of governmental functions. That analysis ignores the factual context in which the discrimination occurred and the reason why the matter was left or put in private hands. It elides the fact that in the cited cases there was no actual or official delegation of power to the private persons involved, but only a clearing of the way to a voluntary assumption and discriminatory exercise by those persons of the governmental function, with the State standing by as a seemingly indifferent neutral. It ignores the fact that residential zoning is also a govern-

mental function. It fails, too, to extract from the decisions—from their rationale, facts and result reached—any generative principle to which they were a response.

V

The Civil Rights Acts, Constitutionally Enacted to Enforce the Fourteenth Amendment, Prohibit Racial Discrimination by Private Persons in Respect of the Acquisition, Ownership and Enjoyment of Property. Section 26, Being Inconsistent With These Federal Statutes, Is Invalidated by the Supremacy Clause.

1. Even Though Private, the Discriminatory Conduct Here Involved Is Barred by the Civil Rights Acts.

First: Decisions of this Court at last term have settled the power of Congress, as an appropriate means of enforcing the Fourteenth Amendment, to deal with private conduct that, even without state involvement, has the effect of abridging or impairing rights secured by the constitution of the United States. [See, *United States v. Guest, supra,* 383 U.S. at 761-762, 780-784; *United States v. Price, supra,* 383 U.S. at 805, 809-813; *Katzenbach v. Morgan, supra,* 384 U.S. at 648-651.[31] If, therefore, the Con-

[31]As a consequence of these decisions, application of the Civil Rights Acts is no longer limited, by fears of unconstitutionality, to acts in which the State is involved or which are done under color of law. So, too, these cases make it clear that the congressional power under section 5 of the Amendment extends to all rights secured or granted by the Federal constitution, not just to those arising from exercise of the substantive powers of the Federal government.

In these respects, the doubt created by this Court's division in *United States v. Williams,* 341 U.S. 70, has been resolved, and the constrictive grip of *The Civil Rights Cases,* 109 U.S. 3, 11-12, 25, has been loosened, as at least six justices of this Court have now agreed. [See, *United States v. Price, supra,* 383 U.S. at 797-801, 805-806; and *United States v. Guest, supra,* 383

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gress has enacted legislation proscriptive of racial discrimination by private persons in the sale or rental of property, it is clear that under the Supremacy Clause [*U.S. Const.*, art. VI, cl. 2] inconsistent or conflicting state legislation must give way. [*Katzenbach v. Morgan, supra*, 384 U.S. at 646-647; *Testa v. Katt*, 330 U.S. 386, 391; *Buchanan v. Warley, supra*, 245 U.S. at 74.] Congress has enacted such legislation—the Civil Rights Acts of 1866 and 1870, which, in relevant part exist today. [42 U.S.C.A., sees. 1981, 1982. And see, pp. 57-61, *infra*.]

Second: Prohibition of private racial discrimination in respect of the acquisition and enjoyment of property is an appropriate means of enforcing section 1 of the Fourteenth Amendment, notwithstanding the section's prohibitions operate directly only upon the States. [*United States v. Guest, supra*, 383 U.S. at 761-762, 783-784; *Katzenbach v. Morgan, supra*, 384 U.S. at 649-653.] The Amendment "granted the right to be free of racial discrimination . . ." [*Terry v. Adams, supra*, 345 U.S. at 468.] Certainly, it "secured" the right, which is enough to justify appropriate enforcement legislation. [See, *United States v. Guest, supra*, 383 U.S. at 778-779.] That treatment of the right, as we have said, imports a policy to rid the nation of the divisive and other injurious consequences of such discrimination. [See, p. 40, *supra*.] So far as concerns the victim of racial discrimination, the Amendment cer-

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U.S. at 761-762, 781-784.] The same may be said of other cases ante-dating *Price* and *Guest*, and in which, therefore, there may be found dialectical support for the argument that Congress is limited to legislating in respect of conduct in which the State is involved. [See, *e.g.*, *Hurd v. Hodge*, 334 U.S. 24, 31-33; *United States v. Williams, supra*, 341 U.S. at 77-78; *United States v. Cruikshank, supra*, 92 U.S. at 554.] They, too, have been sapped of vital force in this respect by the cases decided at last term.

tainly aims at securing to him a right that will largely, if not indeed fully, shield him from the personally harmful and humiliating effects that ensue upon being subjected to racial discrimination. The effects may be, they have been, produced by private discrimination. The socially undesirable evils that ensue are the same, whether the conduct be that of the State or the voluntary act of private individuals. [*Cf., Burton v. Wilmington Parking Authority, supra,* 365 U.S. at 724-725.] In either event, full achevement of an important objective of the Amendment is obstructed. Legislation seeking to remove or prevent the obstruction is an appropriate means of achieving the object the Amendment has in view.

The power of the Congress to enact such legislation is the power, granted by section 5 of the Fourteenth Amendment, "to enforce, by appropriate legislation, the provisions of this article." Enforcement may appropriately extend to the broad aims or objects of the Amendment as well as to its strict letter. That is shown by *Guest, supra,* 383 U.S. 745, in which the provisions "of this article" with which this Court was concerned, secured rights only against state action. Nonetheless, at least six justices of the Court recognized that legislation against conduct that did not include state action was an appropriate means of enforcing the provisions "of this article." [*United States v. Guest, supra,* 383 U.S. at 761-762, 774-777, 781-784.] The same must be true of the "right to be free of racial discrimination"—a right that surely is on a parity with the right to travel, which was the one specifically involved in *Guest.*

Third: Under the Congressional legislation, all people are guaranteed the same right to make contracts and

to purchase, hold and lease real property as is enjoyed by white citizens. [42 U.S.C.A. secs. 1981, 1982.] This guarantee imports, indeed for its effectiveness it must mean, that all conduct destructive of it is banned.[32] The history of this legislation, the conditions that brought it into being, the goal it was designed to reach, give ample assurance of the congressional purpose to reach private conduct that had the effect of impairing or frustrating constitutional rights:

The original Civil Rights Acts were, of course, part of the reconstruction of the South at the end of the Civil War. The oppressive actions to which the newly freed Negro was subjected in the states of the former Confederacy, and to the curbing of which the Acts were directed, were not alone, or even primarily, the acts of the states. "It was perfectly well known that the great danger to equal enjoyment by citizens of the rights, as citizens, was to be apprehended not altogether from unfriendly State legislatures, but from the hostile action of corporations and individuals in the States . . ." [*United States v. Guest, supra,* 383 U.S. at 783 (fn. 8), quoting Harlan, J., dissenting in *The Civil Rights Cases, supra,* 109 U.S. at 54.] And, so, it was these private acts that sought to continue the Negroes' subjugation—acts such as economic reprisals and the terrorism of the night-riding Klu Klux Klan—to which the Civil Rights legislation was directed. [see, *United States v. Price, supra,* 383 U.S. at 800-802; *United States v. Mosley, supra,* 238 U.S. at 387-388;

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[32] *Cf.*, the analogous construction given by this Court to other parts of the Civil War statutes, *e.g.*, 18 U.S.C.A. secs. 241, 242 in *United States v. Price, supra,* 383 U.S. at 800-801; *Virginia v. Rives,* 100 U.S. 313, 318. See, also, *United States v. Guest, supra,* 383 U.S. at 777 (Brennan, J., concurring and dissenting); *United States v. Mosley,* 238 U.S. 383, 386-388.

United States v. Williams, supra, 341 U.S. at 73, 75-77.] These constituted the evil at which the Congress was aiming. These were the reasons why the successive Civil Rights Acts were not limited merely to official conduct or conduct carried on under color of law, but embraced all conduct having the feared destructive effect upon constitutional freedoms.[33]

The language of the congressional enactment brooks of no limitation to conduct carried on under authority or color of law; other provisions deal with that. [*e.g.*, 42 U.S.C.A., sec. 1983; 18 U.S.C.A., sec. 242.] There is no qualification of the full sweep of the words used. Those words are broad enough to include, as they were intended to include, private conduct. It is inconceivable, the depredations of the Ku Klux Klan being then up-

[33]At first, the "Black Codes" of the Southern States imposed official discrimination upon the supposedly freed Negro. But the Reconstruction Acts, which were adopted in 1867, had by 1868 put Southern legislatures pretty largely under the domination of the Freedmen and the Radical Republicans and their sympathizers (the so-called "carpetbaggers" and "scalawags"). The kind of legislation to be expected from legislatures so dominated was not a live threat to the Negro. The immediate and real threat, at the time, was the reaction of the Southern conservatives to the Radical Republican reconstruction policy. That reaction took the form of private suppression of the Negroes, best typified by the familiar story of the rise and terroristic reign of the Ku Klux Klan. [Generally, see: Dulles, *The United States Since 1865* (U. of Mich. Press, 1959) pp. 5-28; *The Columbia Encyclopedia* (3d ed. Columbia Univ. Press, 1963); article "*Reconstruction*," pp. 1775-1776; *United States v. Price, supra,* 383 U.S. at 800-802.] The first Civil Rights or Enforcement Act, after ratification of the Fourteenth Amendment, was the one of 1870. [Act of May 31, 1870, 16 Stat. 141.] By then, the States, as such, were not in official opposition to the Reconstruction policy of equality for the Negro. The private opposition to that policy, however, was riding hard to burke it. The Act of 1870 was meant to enforce the Fourteenth Amendment and to make its guarantees a reality. To accomplish that purpose in the existing circumstances, private conduct had to be reached.

permost in the congressional mind, that the words would have been so qualified as to leave the terroristic Klansmen beyond the law's reach. [*United States, v. Price, supra,* 383 U.S. at 805.]

The enforcement legislation, as this Court has but recently emphasized [see, pp. 55-56, *supra*], dealt with all Federal rights, and with any conduct that might have the practical effect of denying them to those whose newly won liberty the Congress was being careful to protect. That legislation means now what it meant then. The meaning to reach private conduct is clear now, as it was then. It cannot now be construed so as "to deprive citizens of the United States of the general protection which on its face [the statute] most reasonably affords." [*United States v. Mosley, supra,* 238 U.S. at 388; *United States v. Price, supra,* 383 U.S. at 801.]

The right to acquire and enjoy property is a right secured by the Fourteenth Amendment. It is guaranteed against *all* destructive conduct, private as well as official, by the Civil Rights Acts. [42 U.S.C.A., secs. 1981, 1982, 1985(3); 18 U.S.C.A., secs. 241, 242.] The statutory guarantee is part of Congress' great design to achieve civil and political liberty for the Negro. Its language must be naturally read; and so read, it is not confined to a guarantee against state action only. [See, pp. 58-59, *supra.*]

The Act thus necessarily imports proscription of conduct that for reasons of racial discrimination impairs or frustrates the right to acquire and enjoy property. The conduct here complained of is of that sort. The right to engage in it is defended by the authority of a legislative act of the State of California. That Act per-

mits and authorizes what the Civil Rights Acts proscribe. [See, pp. 23-39, *supra.*]

Section 26 is thus seen to be in direct opposition to Federal policy. It permits or authorizes that which the Federal statute prohibits. The state statute is being used to just that end. The respondents here were denied housing accommodations because of their race. To justify and legitimatize that conduct petitioners invoke section 26. If that effect is given to the section it is obvious that conduct proscribed by the Civil Rights Acts of 1866 and 1870 has been made lawful. The Supremacy Clause cannot be so readily evaded. [Cases cited, p. 56, *supra.* Also, *cf., Pennsylvania v. Nelson,* 350 U.S. 497, 502-510; *Hamm v. Rock Hill,* 379 U.S. 306, 308-312.]

2. Petitioner's Discriminatory Conduct Was Done Under Color or Pretense of Law and in That Respect Is Contrary to the Civil Rights Acts.

Even if some state involvement is needed to make the Civil Rights Acts applicable [see, *Monroe v. Pape,* 365 U.S. 167, 171; *Civil Rights Cases, supra,* 109 U.S. at 11-12, 25. But, *cf., Heart of Atlanta Motel v. United States,* 379 U.S. 241, 250-252] that involvement exists in the instant case. What petitioners have done was done under "color of law" and that is enough to bring their conduct within the reach of the Civil Rights Acts.[84] To be done under color or pretense of law an act need not be only an authorized or official act of the State. [*Ex parte Virginia,* 100 U.S. 339, 347; *Wil-*

[84] "Color of law" includes "pretense of law." [*Screws v. United States, supra,* 325 U.S. at 111; *Baldwin v. Morgan,* 5 Cir., 251 F. 2d 780, 786-787; *Valle v. Stengel,* 3 Cir., 176 F. 2d 697, 701.]

liams v. United States, 341 U.S. 97. *Cf., Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 283-286, 287-288; *United States v. Price, supra*, 383 U.S. at 793.] It is enough that it is a use, or even misuse, of power possessed by virtue of state law and made possible because the actor is clothed with the authority of state law. [*Monroe v. Pape, supra*, 365 U.S. at 185; *Screws v. United States, supra*, 326 U.S. at 109, 112, 121-122.] It is immaterial in this regard that the actors are not officers of the State. [*United States v. Price, supra*, 383 U.S. at 794, 805-806.]

The right to discriminate has been made a constitutional right in California by section 26. [See, pp. 23-28, *supra*.] One who exercises that right, therefore, and seeks to avoid any sanctions on account of it, does so by virtue of a power possessed under and authorized by state law. Without the immunizing effect of section 26, an owner of residential property in California could not lawfully refuse to sell, rent or lease it on grounds of race or color. [See, pp. 15-16, *supra*.] Because of that section, however, owners of residential property are free to refuse to sell, rent or lease on such grounds. The legal power so to act is theirs only because of the power or immunity conferred by section 26. The justification for it in law is asserted under and by virtue of the section. Their action, therefore, is taken under color or pretense of law.

Furthermore, in "cases under §1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment . . ." [*United States v. Price, supra*, 383 U.S. at 794 (fn. 7).] We have shown that "state ac-

tion" in the now accepted sense exists in respect of section 26. [See, pp. 29-39, *supra.*] That being so, the constitutionality and applicability of 42 U.S.C.A., sees. 1282, 1283, are established. Thus, it becomes immaterial whether rights against an individual, rather than only the State, are secured by the Fourteenth Amendment. It is enough that the state legislation, as here sought to be applied against the respondents, is inconsistent with a valid Federal statute.

VI.

The Court Below Properly Held That the Power of the State's Judicial System Could Not Be Enlisted to Enable One in the Rental Business to Carry Out That Business in a Racially Discriminatory Manner.

In the *Snyder* case, the petitioner Snyder, by his cross-complaint prayed for a judgment declaring that he "has a right to have a court of law recognize and enforce the termination of [Prendergasts'] tenancy . . . even if [his] sole reason for so terminating and for seeking such court recognition of the same were the race of [respondent] Wilfred J. Prendergast." [R. 66.] The trial court was of the view, and the State Supreme Court, as an alternative ground of decision, agreed [R. 74-78, 84], that this invocation of the court's aid in enforcing Snyder's discriminatory purpose was beyond the court's constitutional power, because an earlier California decision [*Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242, 22 Cal. Rptr. 309] had applied to such a situation the doctrine of this Court's decision in *Shelley v. Kraemer, supra,* 334 U.S. 1.

This Court said in *Shelley,* that the Fourteenth Amendment "makes void 'State action of every kind' which is inconsistent with the guaranties therein contained, and extends to manifestations of 'State authority in the shape of laws, customs or judicial or executive proceedings . . ."

The principle thus enunciated is a complete answer to the petitioners' challenge of the decision below in *Snyder.* Petitioners' challenge, indeed, is not to the applicability of the *Shelley* doctrine to the Snyder facts, but is an attack on *Shelley.* It amounts to little more than several variations on the theme that *Shelley* was wrongly decided.

They argue in that connection that *Shelley* should not be permitted to go beyond the case of a willing buyer and seller who would be compelled against their wills, by judicial enforcement of a racial covenant, to discriminate. [*Br.,* 54-55.] What is ignored in that argument is that it is the purpose of the Fourteenth Amendment to protect the individual against racial discrimination by the State; and, that, when the State aids or enforces such discrimination through the processes of its courts, it is the State acting governmentally that imposes the discrimination upon the unwilling victim. That victim, has a constitutional right, as this Court said in *Terry v. Adams, supra,* 345 U.S. 468, "to be free of racial discrimination . . ." As Mr. Chief Justice Vinson later explained *Shelley* (in which he wrote this Court's opinion), this Court "held that such judicial action which operated directly against the Negro petitioners and deprived them of their right to enjoy their property solely because of their race, was state action and constituted a denial of 'equal protection.'" [*Barrows v.*

Jackson, 346 U.S. 249, 261, Vinson, C.J., diss.] That is the real thrust of *Shelley*—the effect of the court's action, enforcing discrimination, upon the person whom the Fourteenth Amendment protects against the State.

Also ignored in petitioners' argument is the significance of *Barrows v. Jackson, supra,* 346 U.S. 249. What was sought from the court there, was not compulsion of a discriminatory choice by one who wanted to make a nondiscriminatory one, but damages by one party to the covenant for the other's breach of it. But, this Court had no difficulty in upholding the state court's refusal to grant the requested relief. This, because of the effect such judicial relief would have in continuing and encouraging racial discrimination by others against those the Amendment protected from racial discrimination by the State.

The thrust and sweep of *Barrows* is, perhaps, best understood by a consideration of Mr. Chief Justice Vinson's dissent, which has unusual significance because of his authorship of the Court's opinion in *Shelley.* The Chief Justice said [346 U.S. at 267]: "The suit is directed against the very person whose solemn promise helped to bring the covenant into existence. The plaintiffs ask only that respondent do what she in turn had a right to ask of plaintiffs—indemnify plaintiffs for the bringing about of an event which she recognized would cause injury to the plaintiffs." And, at page 268: "The Court should not undertake to hold that the Fourteenth Amendment stands as a bar to the state court's enforcement of its contract law." As seen, the Court thought otherwise.

The instant case is, in effect, no different from *Barrows.* Just as the Fourteenth Amendment stands in the way of a state court's enforcing its contract law

when the result of so doing will effectuate racial discrimination, so does it bar a state court from enforcing its eviction laws when the result of so doing will effectuate racial discrimination.

Petitioners urge [*Br.* 60] that to uphold California's refusal to allow its courts to be used to support the business landlord's racially discriminatory rental policy means that "an issue of Constitutional proportions and psychiatric overtones may be presented in virtually every dispute between members of different racial, religious or political groups."

Petitioners protest too much.. The question whether a landlord is evicting a tenant solely by reason of his race, is a question of fact, no more nor less different of ascertainment than if there were a statute which prohibited that conduct and allowed a suit to enjoin it or to recover damages because of it. [*e.g.*, the Unruh Civil Rights Act, fn. 5, p. 8, *supra.*] But petitioners make no contention that such legislation is invalid; and, indeed, it is valid. [See, *Colorado Anti-Discrimination Com. v. Case,* 151 Colo. 235, 380 P. 2d 34; *Massachusetts Com. Against Discrimination v. Colangelo,* 344 Mass. 387, 182 N.E. 2d 595.]

A denial of equal protection to petitioner *Snyder* is asserted by petitioners, because in *Hill v. Miller, supra,* 64 Cal. 2d 757, 415 P. 2d 33, 51 Cal. Rptr. 689, the court below affirmed a judgment denying the tenant an injunction against a threatened eviction.[35] [*Br.*,

[35]What was decided in *Hill* was only that there was no cause of action to compel an owner of a single family residence to rent to another, albeit the reason for not renting is based on race. So long as no enforcement of racial discrimination was asked of the court, the tenant was not being denied equal protec-

(This footnote is continued on the next page)

55-58.] That difference did not depend, as petitioners seem to be complaining, upon an "election among available procedural formalities . . ." [*Br.*, 55.] It came about, because in *Hill* the landlord was not, whereas in *Snyder* he was, seeking the court's enforcement of his racially discriminatory purpose. The difference is not merely the happenstance of the position of the parties on the pleadings. The difference is fundamental. In the one case, the State is involved; in the other it is not. It makes perfectly good sense, as well as being sound constitutional doctrine, for the rule to be that "a State may not enforce racial discrimination." [Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. Law Rev. 473, 491.]

Shelley is not the only case refusing to enforce private rights or claims, because to do so would put the State, through its courts, in the position of abridging a federal constitutional right secured against the State. A good example is *New York Times v. Sullivan,* 376 U.S. 254, an action between private parties, in which it was held that a cause of action under State law for libel could not be enforced, because enforcement would be a deterrent to exercise of the right of free press, secured by the First Amendment as incorporated into the Fourteenth. [See, also, *Time, Inc. v. Hill* (Jan. 9, 1967), ... U.S. .....]

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tion. Judicial enforcement of the discrimination, however, would be another matter. [64 Cal. 2d at 759-760, 415 P. 2d at 34, 51 Cal. Rptr. at 690.]

Conclusion.

The judgments of the State Supreme Court should be affirmed; or, alternatively in *Mulkey*, the writ of certiorari should be dismissed, as improvidently granted.

Respectfully submitted,

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